Supreme Court, U.S.
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No. _____

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In the

SUPREME COURT OF THE UNITED STATES

John L. Corrigan,

Petitioner

v.

United States;

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

John L. Corrigan
31912 – 53rd Place South
Auburn, WA 98001
Pro Se
253.735.5025

QUESTIONS PRESENTED

Whether the U.S. Claims Court violates due process protections when it dismisses a legitimate claim under summary judgment.

LIST OF PARTIES

For the Petitioner:

John L. Corrigan
31912 – 53rd Place South
Auburn, WA 98001-3877
253.735.5025

For the Respondent:

Department of Justice
Attn: Dawn S. Conrad
Classification Unit 8th Floor
1100 L. Street NW
Washington, D.C. 20530
202.307.1011

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OPINIONS BELOW

The opinions of the United States Court of Federal Claims, and the United States Court of Appeals for the Federal Circuit are unreported.

JURISDICTION

The judgment of the United States Court of Federal Claims was entered on November 15, 2005. (App. 1). The judgment of the United States Court of Federal Claims on Reconsideration was entered on May 10, 2006. (App. 27) On appeal to the United States Court of Appeals for the Federal Circuit the court affirmed the judgment on March 14, 2007. (App. 47) United States Court of Appeals for the Federal Circuit issued as a mandate: May 14, and May 29, 2007. (App. 53) United States Court of Appeals for the Federal Circuit petition for panel rehearing and rehearing en banc were denied on May 22, 2007. (App. 54)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The "due process clause" of the 5th Amendment to the U.S. Constitution. The Federal

Travel Regulations (FTR), 41 C.F.R. pts. 300-304 (2004). The NCUA Travel Manual.

STATEMENT OF THE CASE

Corrigan is a credit union examiner for the National Credit Union Administration (NCUA). Corrigan submitted grievance issues relating to overtime pay and travel expenses through his agency, the General Services Board of Contract Appeals (GSBCA), the U.S. Court of Appeals for the Federal Circuit, the U.S. Supreme Court, [1] over to the U.S. Court of Federal Claims, and then back to the U.S. Court of Appeals for the Federal Circuit.

Corrigan has dropped his appeal relating to overtime pay but continues his appeal for travel expenses relating to: 1) Lodging expenses in Seattle, Washington; 2) Car Rental; 3) Lodging and per diem claim for Orlando, Florida; and 4) Loading and per diem claim for Alexandria, Virginia.

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[1] The U.S. Court of Appeals would not hear the appeal because the GSBCA ruled under the GAOA, 31 USC § 3702 which the COA determined it cannot review, rather than the CDA, 41 USC § 607 which the COA can review. Appeal was taken to the US Supreme Court but Cert was denied.

QUESTION PRESENTED

Whether the U.S. Claims Court violates due process protections when it dismisses a legitimate claim under summary judgment.

ARGUMENT

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> . . . Indeed, "justice must satisfy the appearance of justice," . . . [Citations omitted] [Emphasis added]

Marshall v. Jerrico, Inc., 100 S.Ct. 1610, 1613, (1980)

Corrigan did not receive a "fair and impartial trial" because the Claims Court improperly dismissed on summary judgment.

> The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. Summary judgment should not be granted unless it is clear that a trial is unnecessary, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ."

Celotex Corp. V. Catrett, 477 U.S. 317, 326, 106 S.Ct. at 2554 (1986) in Justice Brennan's dissent, with the Chief Justice and Justice Blackmum joining in the dissent. Consider:

Evidence in the Record

The record shows two General Services Board of Contract Appeals (GSBCA) decisions (Yates[2] and Thurman[3]) that directly relate to Corrigan's claims in which personal convenience for travel was analyzed and granted in favor of the traveler and against the agency involved.

The Claims Court is aware that this case came through the GSBCA.[4] Even though the GSBCA ruled against Corrigan, it establishes that there was a genuine issue (travel expenses) for the Claims Court to determine.

Further, the Claims Court's analysis of travel expenses is in direct contradiction to the decisions of both Yates and Thurman. Both GSBCA decisions call for the determination of actual vs. constructive costs. The Claims Court does not properly apply the same analysis in granting summary judgment. For example: In Yates, lodging expenses are granted in the calculation for constructive costs in spite of the fact that the FTR only allows the hook-up fee for an RV. Yates' analysis allowed for the full lodging expenses ($100/day) to help offset the costs of gas to get to the temporary duty station. However, the

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[2] GSBCA 15109-TRAV - see App. 55

[3] GSBCA 15562-TRAV

[4] Corrigan was prevented from appealing the decision to the appellate court because the GSBCA used "A" instead of "B" in making its decision. Cert was denied on the subject. Therefore, Corrigan submitted the claim to the US Claims Court, and then to the Court of Appeals.

Claims Court determined that because Corrigan stayed with relatives the FTR (by law) allows for only actual out of pocket expenses (which is true under the FTR)[5] - but that does not mean that Corrigan cannot be reimbursed for other expenses "in total" – like Yates was where lodging under "constructive costs" could be offset against actual costs (like gas). The Claims Court misapplies the FTR and misapplies both Yates and Thurman.

Moving Party Has Burden of Persuasion

Here is what the Claims Court states about defendant's "burden of persuasion:"

> Defendant argues that plaintiff's travel expense claims lack merit. Def.'s Mot. At 25. Defendant asserts that NCUA properly denied

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[5] How this works is that when a traveler determines his constructive costs, the traveler lists lodging at 4 days @ $100 dollars a day plus airfare @ $400 plus etc. etc. for a total of $1,500. Then the traveler lists his actual expenses: Now because Corrigan stayed with relatives he cannot claim actual expenses for "lodging" (just like the Claims Court determined). However, Corrigan can claim other legitimate expenses like car rental – even if he was not authorized to claim under constructive costs. If Corrigan's claim for actual expenses is lower than or equal to his constructive costs of $1,500, he is reimbursed the $1,500 (equal to) or the lower amount – never being reimbursed over the constructive costs of $1,500. So even though Corrigan did not have actual costs for lodging, Corrigan can offset those lodging costs for car rental – just like Yates offset his lodging cost to gas for his RV – within the FTR as explained by Yates and Thurman.

> the claims and that the General Services Board of Contract Appeals properly sustained the agency's denial of Mr. Corrigan's travel expense claims.

Order, at App. 14.

These claims like "lack merit" and "NCUA properly denied the claims" do not meet the stringent "burden of persuasion" addressed in Coletex.

> But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

Coletex. JUSTICE WHITE, concurring.

Reasonable Inferences Were Not Viewed In Nonmovant's Favor

The Claims Court viewed all inferences in the light most favorable to the movant. The Claims Court's misapplication of the FTR, Yates and Thurman all point to this. The court's analysis is not a matter of "law" but of the court's interpretation of the law.

> Credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court on a motion for summary judgment: if, as to the issue on which summary judgment is sought, there is any

> evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper.

Curry v. City of Syracuse, 316 F.3d 324 (C.A.2d, 2003)

> . . . When a court is confronted with facts that permit several different conclusions, all inferences from the underlying facts must be drawn in the non-movant's favor. *Quarantino v. Tiffany & Co.*, 71 F.3d 58,64 (2d Cir. 1995) The trial court must bear in mind that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)

B.F. Goodrich v. Betkoski, 99 F.3d 505, 521 (2nd Cir. 1996). This also shows up in the Construction v. Allowable Costs below.

The Claims Court has nine pages of making "credibility determinations, weighing of the evidence, and drawing of legitimate inferences from the fact. These are jury functions not those of a judge. Summary judgment was improper.

> Order granting summary judgment was required to be vacated when the court failed to assess the record in favor of the nonmoving

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party and instead resolved disputed issues of fact by crediting the movant's assertions. Wright v. Coughlin, 132 F.3d 133 (C.A.2d, 1998). This also shows up in the Construction v. Allowable Costs below.

Constructive v. Allowable Costs

The crux of the claims and where the Claims Court exceeded the parameters of summary judgment can be identified by reviewing the differences between the Constructive Costs and the Allowable Costs. For illustrative purposes, the following exhibit will be used:

	Constructive Costs	Line #	Allowable Costs	Line #
Airfare	300	1		21
Mileage		2	350	22
Food	200	3	200	23
		4		24
Lodging	600	5	0	25
Car Rental		6	300	26
		7		27
Total	1,100		850	

There are four elements to this issue:

1. Constructive costs - travel in the best interests of the government:

2. Allowable costs – allowability of the various components of an employee's travel claim;
3. Individual FTR section – like cannot claim car rental car without supervisor's approval; and
4. Comparative Cost Statement – which lists the differences between constructive vs. actual[6] - like the exhibit above.

The Claims Court (and the Appellate Court) claim that because Corrigan did not have supervisory approval for a car rental – Corrigan cannot claim car rental expenses. (App. 16-20 – for both car rental and staying with relatives) This is only partially true. Because there was no approval, Corrigan cannot claim "Constructive Costs" – Line #6. However, the car rental is an "Allowable Cost" (transportation) which Corrigan can claim under Allowable Costs – Line #26. See Yates (App. 55) and Thurman.

Also, the Claims Court determined that because Corrigan stayed with relatives he was not entitled to claim lodging costs. That is true. However, Corrigan is still entitled to the "total" constructive cost ($1,100) if his allowable costs exceed those

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[6] **F. Comparative Cost:** A comparative cost statement (supporting document) must be maintained similar to any other receipt or supporting documentation. The comparative cost statement will show constructive (hypothetical) costs which would have been incurred versus the costs actually incurred. The lesser of total actual or constructive costs will be claimed for reimbursement. NCUA Travel Manual 8.6(F).

costs. In the example, Corrigan should be reimbursed $850 – the total allowable costs because those costs are less than the constructive costs. But look, the car rental of $300 on Line 26 is properly included. Therefore, in this case, Corrigan should be entitled to car rental reimbursement - even though Corrigan's supervisor did not approve the car rental.

The Claims Court's analysis, respectfully, is a fast and loose interpretation designed to improperly dismiss this controversy on summary judgment. The FTR, the NCUA Travel Manual, Yates, Thurman, and of course, Corrigan, all refute the Claims Court's analysis. And, even if they are proved wrong after a full-blown trial, at this point in the proceedings, Corrigan - by summary judgment rules, deserves all legitimate inferences in his favor.

Also, consider Yates.

This is exactly what happened in Yates. (App. 55) The agency claimed that Yates was only entitled to the hookup charge under lodging for his RV. In effect, paying for the hookup/lodging of $100, but then reducing the Constructive Cost by $500 (Lodging of $600 minus the $100 hookup/lodging). However, Yates said "Wait a minute. That is not how the calculation works." Yates said the total constructive cost remains $1,100 (the entitlement to travel reimbursement) and for Yates to add his mileage costs (gas) for driving his RV to the temporary duty station giving Yates what he was requesting from the GSBCA.

This is factually similar to Corrigan's claim where the Claims Court wants to reduce the constructive costs for lodging to $0 (from $600) because Corrigan stayed with relatives. Again, the FTR, the NCUA Travel Manual, Yates, Thurman, and Corrigan disagree with the Claims Court's interpretation.

Claiming that Corrigan is not entitled by law to these travel expenses without a properly applied Comparative Cost Statement is a major, critical, genuine issue, improper inference by the Claims Court. Summary judgment is improper.

Reason For Granting Cert

The reason for granting cert in this case is not because of any major conflicts with other circuits.[7] Corrigan asks that the court be "motivated by a feeling that the decision represents a gross miscarriage of justice or a subtle erosion of a statutory or legal principle, or that the result reached below is unduly harsh in its impact."[8]

Granted, a few miscellaneous travel expenses should not be an issue for this august Court. The problem gathers momentum when one considers the number of arbitrary decisions made daily by

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[7] Although Corrigan did do an analysis of some of the GSBCA's travel decisions and found them to be very inconsistent -- even by the same judges. (App. 60)

[8] Supreme Court Practice, 7th Edition, © 1993 by The Bureau of National Affairs, Inc., Washington, D.C.

supervisors/agencies denying legitimate travel expenses, and even by the GSBCA in their arbitrary interpretations. (App. 60) Consider Yates from a common sense point of view. Here is a government traveler who takes his gas eating RV to his temporary duty station, expecting to offset his "lodging" expenses to help pay for the gas. Instead, his agency limits his "lodging" expenses to a $15 hook-up charge because the agency claims that is what the regulation says. However, Yates, correctly analyzes the situation in the "total" circumstances – as the Federal Travel Regulation provides for. Like Corrigan who traveled a different route than the "best interests of the government" for personal convenience, Yates also traveled a different route (RV) for personal convenience.

The miscarriage of justice or erosion of a statutory or legal principle comes into play when the Claims Court does not give Yates its due – both in the "material issue" context and the fact that a "reasonable man" can differ about the outcome of the evidence presented. Further, as explained, the inferences taken by the Claims Court were certainly *not* in favor of the nonmoving party.

The lines drawn for summary judgment have become very blurry. It seems that courts determine what they feel like under the umbrella of *summary judgment*. When, as here, the courts in the interests of judicial economy, or some other non-legitimate factor, blindly hammer the round peg into the square hole, it does none of us any good. The Claims Court

has gone way beyond the parameters of summary judgment.

Finally, and no matter what the final outcome is, the judicial process has been diminished by this decision. When the courts rule outside the parameters of a particular legal concept, that ruling brings into question the prejudice, credibility, and integrity of the judicial system.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

John L. Corrigan
Pro Se
31912 53rd Place South
Auburn, WA 98001-3877

August 2007

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

John L. Corrigan,
Plaintiff,
v.
The United States,
Defendant

Motions to Dismiss and for Summary Judgment; Whether Fair Labor Standards Act (FLSA) Claims Are Barred by the Statute of Limitations; Whether Federal Employee Pay Act (FEPA) Claim Must be Dismissed for Failure to Demonstrate that the Claimed Overtime Was Approved in Writing; Whether the Position of CU-11 Credit Union Examiner is FLSA-Exempt; Whether Certain Travel Expense Claims Were Properly Denied

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Dawn S. Conrad, with whom were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Kathryn A. Bleecker, Assistant Director, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, for defendant. Kathy M. Sachen-Gute, National Credit Union Administration, of counsel.

OPINION AND ORDER

Before the court is Defendant's Motion to Dismiss and Motion for Summary Judgment (Def.'s Mot.) and the following responsive briefing: Plaintiff's Response to Dismiss and Motion for Summary Judgment (Pl.'s Resp.) and Defendant's Reply in Support of Its Motion to Dismiss and Motion for Summary Judgment (Def.'s Reply). Defendant moves to dismiss for want of jurisdiction plaintiff's Fair Labor Standards Act (FLSA or Act) overtime claims that accrued more than three years before the filing

of plaintiff's complaint on the ground that those overtime claims are time-barred. See Def.'s Mot. at 1 (citing Rule 12(b)(1) of the Rules of the Court of Federal Claims (RCFC)). Defendant moves to dismiss for failure to state a claim on which relief can be granted plaintiff's Federal Employee Pay Act (FEPA) overtime claims on the ground that plaintiff cannot demonstrate that the claimed overtime was ordered or approved in writing. Def.'s Mot. at 1 (citing RCFC 12(b)(6) and Doe v. United States, 372 F.3d 1347 (Fed. Cir. 2004)). Defendant moves for summary judgment on plaintiff's remaining FLSA overtime claims on the ground that plaintiff's position as a CU-11 credit union examiner is classified as FLSA exempt. Def.'s Mot. at 1 (citing RCFC 56(b)). Defendant also moves for summary judgment on plaintiff's travel expense claims on the ground that the government properly denied the claims under the Federal Travel Regulations and the National Credit Union Administration's Travel Manual. Def.'s Mot. at 1. For the following reasons, defendant's motion to dismiss is GRANTED with respect to plaintiffs FLSA overtime claims that accrued three years before the filing of the complaint. Defendant's motion for summary judgment is GRANTED with respect to plaintiff's remaining FLSA overtime claims, with respect to plaintiffs FEPA overtime claims, and with respect to plaintiffs travel expense claims.

I Background

Plaintiff is a credit union examiner for the National Credit Union Administration (NCUA). Defendant's Proposed Findings of Uncontroverted Fact (DPFUF) 1.[9] NCUA is an independent agency in the executive branch of the federal government. 12 U.S.C. § 1752a(a) (2000). The agency is responsible for regulating, examining and insuring

[9] Facts cited to the filings of only one party do not appear to be in dispute

federally chartered credit unions, federally insured state-chartered credit unions and federally insured corporate credit unions. See 12 U.S.C. §§ 1751-1795 (describing NCUA's responsibilities). NCUA examiners assist the employees of federal credit unions in performing their duties primarily through on-site examinations of the credit unions. See 12 U.S.C. §§ 1756, 1784. Credit union examiners work from their homes and travel to the credit unions to conduct examinations. Def.'s Mot. at 3 (citing Appendix to Defendant's Motion to Dismiss and Motion for Summary Judgment (App.) at 20-26 (position description for a credit union examiner)).

On November 14, 1999, Mr. Corrigan began working for NCUA in the position of a CU-9 examiner.[10] App. at 32 (Corrigan's Conditional Appointment Notification of Personnel Action Form). NCUA classified his position of CU-9 examiner as non-exempt from the provisions of the FLSA. DPFUF at ¶ 3; 29 U.S.C. § 213(a)(1). His initial duty station was Los Angeles, California. DPFUF at ¶¶ 1-2.

"On January 14, 2001, NCUA promoted Mr. Corrigan to a CU-11 credit union examiner position and assigned him a district of credit unions![11] DPFUF 6 (citing App. at 35 (Corrigan's Promotion Notification of Personnel Action Form)). NCUA classified his position of CU-11 examiner as exempt from the provisions of the FLSA based on the professional exemption. See App. at 35 (Corrigan's Promotion Notification of Personnel Action Form), 39 (Corrigan's Reassignment Notification of Personnel Action Form), 7981 (FLSA Report for Corrigan's FLSA Claim).

At Mr. Corrigan's request, he was reassigned to a duty station in Seattle, Washington to work with a different group of NCUA examiners. DPFUF TT 9-10. His reassignment

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[10] Positions at NCUA are designated by the prefix CU. DPFUF at 1 n. 1.

[11] Headquartered in Alexandria, Virginia, NCUA operates through five regional offices. App. at 1-2 (NCUA Organizational Chart and Central Office Directory).

became effective on April 8, 2001. Id. II 10 (citing App. at 39 (Corrigan's Reassignment Notification of Personnel Action Form)). Mr. Corrigan continues to work in the position of a CU-11 examiner. Id. 6.

Mr. Corrigan filed suit on October 20, 2004 seeking overtime pay under the FLSA, 5 U.S.C. §§ 201-216 (2000), and under the FEPA, 5 U.S.C. §§ 5542, 5544, 5546 (2000). See Complaint (Compl.) 1; Amended Complaint (Am. Compl.) ¶ 2. He also seeks reimbursement for denied travel expenses under NCUA's Travel Manual, certain provisions of the Federal Travel Regulations (FTR), 41 C.F.R. pts. 300-304 (2004), the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996),[12] and the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2000). Am. Compl. ¶ 3.

Mr. Corrigan alleges that he performed: (1) "[s]uffered and permitted work in the form of training travel on Sundays for non-working days during regularly scheduled working hours," id. 7, (2) "[s]uffered and permitted work in the form of training travel on both non-working days and working days during regularly scheduled and nonscheduled working hours." id. at 118. (3) "[s]uffered and permitted work in the form of claimed 'commuting' time for overnight travel away from duty station," id. at 119, and (4) "[s]uffered and permitted work in the form of claimed 'commuting' time for travel to and from the work site within the official duty station," id. at ¶ 10. He seeks overtime pay for the periods extending from December

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[12] The cited Public Law amended various sections of the United States Code pertaining to the "auditing, reporting, and other functions" of the General Accounting Office. See 110 Stat. 3826. From plaintiffs complaint, see Compl. 113, it appears that the section on which plaintiff relies is 31 U.S.C. § 3702, which provides in pertinent part:

> The Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for official travel and transportation, and for relocation expenses incident to transfers of official duty station.

31 U.S.C. § 3702(a)(3) (2000).

1, 1999 to present and from December 1, 2000 to present. Id. at if 6.

Defendant has moved to dismiss and for summary judgment.

II. Discussion

A. Standards of Review

RCFC 12(b)(1) governs the dismissal of a claim for lack of subject matter jurisdiction. Whether jurisdiction exists is a "threshold" issue for consideration. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998). The court must accept as true the facts alleged in the complaint and must draw all reasonable inferences in plaintiff's favor. See Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988). Plaintiff bears the burden of proving, by a preponderance of the evidence, that the court has jurisdiction to hear an alleged claim. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) ("If [plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."); Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379, 1383 (Fed. Cir. 2002); Reynolds, 846 F.2d at 748 ("[O]nce the [trial] court's subject matter jurisdiction was put in question it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

RCFC 12(b)(6) governs the dismissal of a claim for failure to state a claim upon which relief can be granted. The court may dismiss a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

RCFC 56(c) provides for the entry of summary judgment "if there is no genuine issue as to any material fact"

and the movant is entitled to judgment as a matter of law. RCFC 56(c); Am. Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1370-71 (Fed. Cir. 2004) ("Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Only genuine disputes over material facts that might affect the outcome of the suit will preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted . . . ."). Evidence that is "merely colorable, or is not significantly probative" will not defeat a summary judgment motion. Id. at 249-50 (citations omitted).

B. Plaintiff's Overtime Claims under the FLSA

Defendant argues that plaintiff's FLSA overtime claims that accrued prior to October 20, 2001, three years before plaintiff filed suit, are barred by the statute of limitations. Def.'s Mot. at 8-9; Def.'s Reply at 2. Pointing to the three-year limitations period for willful violations of the FLSA, defendant asserts that "[e]ven assuming for purposes of this motion that defendant willfully violated FLSA, the longest statute of limitations applicable to Mr. Corrigan's FLSA claims would be three years." Def.'s Mot. at 9 (citing 29 U.S.C. § 255(a)).

Plaintiff asserts that his overtime "[c]laims prior to October 20, 2001 are not time- barred" because he submitted a first stage grievance to NCUA on January 20, 2002. Pl.'s Resp. at 1. Relying on the CDA requirement that ""[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision,'" plaintiff argues that the submission of his

first stage grievance to NCUA constitutes the filing of a claim and therefore, the filing of his "complaint." Pl.'s Resp. at 1 (quoting 41 U.S.C. § 605(a)).

The FLSA requires that an action be commenced within two years after the cause of action has accrued and, if the violation of the Act is willful, that an action be commenced within three years after the cause of action has accrued.[13] 29 U.S.C. § 255(a). "[A] claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." Cook v. United States, 855 F.2d 848, 851 (Fed. Cir. 1988) (citing Beebe v. United States, 640 F.2d 1283, 1293 (Ct. Cl. 1981) (stating that a cause of action accrues on the pay day for the work at issue)).

Here, plaintiff seeks overtime pay for the time periods of "December 1, 1999 to present" and "December 1, 2000 to present." Am. Compl. at ¶ 6. He filed suit on October 29, 2004. Compl. at 1. Contrary to Mr. Corrigan's assertions, the filing of his NCUA grievance, an administrative claim, "does not toll the statute of limitations imposed by section 255(a)." Hickman v. United States, 10 Cl. Ct. 550, 552 (1986) (citations omitted).

Nor is plaintiff's case governed by the CDA. Mr. Corrigan was appointed to his position with NCUA,[14] see App. at 32 (Corrigan's Conditional Appointment Notification of Personnel Action Form), and it is well-established that "federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the

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[13] To establish a willful violation of the FLSA, a plaintiff must show that the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Act. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988).

[14] Mr. Corrigan's appointment as a credit union examiner with NCUA was conditioned upon a one-year probationary period. App. at 32 (Corrigan's Conditional Appointment Notification of Personnel Action Form).

government." Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985) (citations omitted).

Mr. Corrigan worked in the position of a FLSA non-exempt CU-9 examiner from November 14, 1999, the date of his employment with NCUA, until January 14, 2001, the date of his promotion to the position of CU-11 examiner. See App. at 32 (Corrigan's Conditional Appointment Notification of Personnel Action Form); id. at 35 (Corrigan's Promotion Notification of Personnel Action Form). Since his promotion on January 14, 2001, Mr. Corrigan has worked in the position of a FLSA-exempt CU-11 examiner. See App. at 35 (Corrigan's Promotion Notification of Personnel Action Form); DPFUF ¶ 6. Assuming, as defendant concedes for purposes of this motion, that plaintiff can show that NCUA willfully violated FLSA, plaintiff's FLSA claims that accrued three years or more before the filing of plaintiff's suit on October 20, 2001 are time-barred. Accordingly, defendant's motion to dismiss plaintiffs FLSA claims that accrued prior to October 20, 2001 is GRANTED.

Defendant moves for summary judgment with respect to plaintiffs remaining FLSA claims. Def.'s Mot. at 13-17; Def.'s Reply at 7-8. Defendant argues that plaintiff was not entitled to FLSA overtime pay as a matter of law during the period of time he worked in the FLSA-exempt position of CU-11 credit union examiner. Def.'s Mot. at 1317. Defendant contends that plaintiff is exempt from the provisions of FLSA under the professional exemption. Def.'s Reply at 7.

Although Mr. Corrigan has not challenged the classification of his position as FLSA-exempt, see generally Compl.; Pl.'s Resp., he nonetheless argues that his remaining FLSA claims do not fail as a matter of law because he is "only exempt from
certain provisions of the FLSA--not all of them." Pl.'s Resp. at 2. Plaintiff acknowledges the Federal Circuit's decision in Doe, 372 F.3d 1347, but asserts that Doe is distinguishable because it addressed claims by attorneys who "are exempt

from all provisions of the FLSA." See Pl.'s Resp. at 2. However, Mr. Corrigan has identified no authorities which support his view that he is "only exempt from certain provisions of the FLSA" and the court is not aware of any legal support for Mr. Corrigan's view.

Under the FLSA, an employee who works more than forty hours per week shall receive overtime pay "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). If "an[] employee [is] employed in a bona fide executive, administrative, or professional capacity," however, the overtime provisions of the FLSA do not apply. 29 U.S.C. § 213(a)(1). Under the implementing regulations of the Office of Personnel Management (OPM), an employee is presumed to be non-exempt and thus, eligible for overtime pay under the FLSA. 5 C.F.R. § 551.202(a). An employee is ineligible for overtime pay under the FLSA if the employing agency correctly determines that the employee "clearly meets the criteria for exemption." 5 C.F.R. § 551.202(d). The exemption criteria are to be "narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption." 5 C.F.R. § 551.202(b). Whether an employee is exempt or non-exempt under the FLSA is determined by "the duties actually performed by the employee." 5 C.F.R. § 551.202(i). The employing agency asserting the exemption bears the burden of proof. 5 C.F.R. § 551.202(c).

To meet the criteria for the professional exemption, an employee must satisfy each of the three tests set forth in the OPM regulation, specifically, the primary duty test, the intellectual and varied work test, and the discretion and independent judgment test. 5 C.F.R. § 551.207. The primary duty test is met if the employee performs work that:

> requires knowledge in a field of . . . learning customarily and characteristically acquired through education . . . that meets the
> requirements for a bachelor's or higher degree, with major study in or pertinent to the specialized field as

> distinguished from general education; or is performing work, comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

5 C.F.R. § 551.207(a)(1). The intellectual and varied work test is met if the employee performs work that "is predominantly intellectual and varied in nature, requiring creative, analytical, evaluative, or interpretative thought processes for satisfactory performance." 5 C.F.R. § 551.207(b). The discretion and independent judgment test is met if the employee "frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work." 5 C.F.R. § 551.207(c).

NCUA's personnel form documenting Mr. Corrigan's promotion to the position of CU-11 examiner on January 14, 2001 reflects the agency's classification of the position as FLSA-exempt. See App. at 35 (Corrigan's Promotion Notification of Personnel Action Form). Nonetheless, Mr. Corrigan filed an administrative claim with OPM on March 26, 2003 seeking FLSA overtime pay and reimbursement for certain work travel. App. at 4344, 74 (Corrigan's FLSA claim filed with OPM). On May 15, 2003, NCUA prepared a report evaluating the FLSA exemption status of the CU-11 credit union examiner position. See App. at 78-114 (NCUA's FLSA exemption report dated 5/15/03 with attachments). Referencing the agency's position description for a CU-11 credit union examiner, see App. at 83-87 (NCUA's position description for CU-11 credit union examiner), NCUA stated its rationale for classifying the position as FLSA-exempt under the professional exemption and specifically addressed each of the three tests required to meet the exemption as follows:

a. Primary duty test: To be hired into a Credit Union Examiner

position, candidates must have knowledge of accounting, auditing, business theory, and finance equivalent to that attained by completing a bachelor's degree in accounting, finance, or business economics. This knowledge is required so that Examiners can independently conduct and complete examinations of federal credit unions and assure their safety and soundness.

b. Intellectual and varied work test: Credit Union Examiner work is primarily intellectual and varied in nature. Credit union examinations involve reviews of numerous credit union activities and many different and unrelated credit union processes and functions, such as accounting records maintenance, information systems and technology, handling and safeguarding of funds and assets, profitability, asset-liability management, investments, and compliance with regulations. Examiners conduct these reviews to determine the financial soundness of the credit union and the effectiveness of management's policies and procedures; assure compliance with applicable laws and regulations; and provide in a written report a complete analysis of risk to the National Credit Union Share Insurance Fund and recommendations for correcting areas of concern. The report provides recommendations such as modifying the accounting systems, revising underwriting standards, and improving management information systems, reporting systems, and internal controls.

c. Discretion and independent judgment: At the CU-11 level, each
Examiner supervises and conducts examinations of Federal credit unions in an assigned district. The Examiner independently plans, conducts, and reports on the complete examination, applying or adapting standard examining practices, while using substantial personal judgment. Based on his her examinations, the Examiner determines which credit unions have

> risk areas that need further attention and meets with credit union officials to resolve conflicts and develop a plan of action to control or reduce risks and prevent significant financial losses.

App. at 79-81 (NCUA's 5/15/03 FLSA exemption report).

OPM reviewed Mr. Corrigan's claim together with NCUA's report. See App. at 117 (OPM's review dated 4/26/04 of Corrigan's FLSA claim). OPM stated that, although plaintiff "believe[d] he should be designated as nonexempt[.] . . . [h]e [did] not provide a rationale as to why the work that he performs is non[-]exempt from the provisions of the FLSA." Id. Applying the regulatory criteria for a professional exemption, see 5 C.F.R. § 551.207, OPM performed an analysis of plaintiffs work in his position as a CU-11 examiner and concluded that Mr. Corrigan's position is exempt and thus, not covered by the provisions of the FLSA. App. at 119.

The court finds, as did NCUA and OPM, that Mr. Corrigan's work as a CU-11 credit union examiner met the criteria for the professional exemption from FLSA coverage. Mr. Corrigan earned both a bachelors and masters degree in business with substantial course work in accounting and finance. See App. at 27-31 (Corrigan's resume and transcripts). Prior to his employment with NCUA, Mr. Corrigan had worked as a financial consultant, an accountant, and a senior auditor with a public accounting firm. App. at 27-29 (Corrigan's resume). As described in NCUA's position description, a CU- 11 credit union examiner must have: (1) "[k]nowledge of the theory, concepts and practices of accounting and auditing sufficient to analyze credit union financial statements and to apply Generally Accepted Accounting Principles;" (2) "[k]nowledge of business theory to understand credit unions and how they function;" and (3) "[k]nowledge of finance to understand the financial operations of credit unions." App. at 85 (NCUA's position description for CU-11 credit union examiner). Mr. Corrigan

possesses and his position as a CU-11 examiner requires the type of specialized education and practical experience contemplated by the primary duty test set forth in 5 C.F.R. § 551.207(a)(1).

The evaluative and analytical processes required to perform Mr. Corrigan's work as a CU-11 examiner, particularly, his review and assessment of the records maintenance, handling of funds and assets, and compliance with regulations by the credit union that he is examining, satisfy the intellectual and varied work test set forth in 5 C.F.R. § 551.207(b). Moreover, the judgment and discretion that is required for Mr. Corrigan to plan, conduct and report on each examination of a credit union and to determine which identified risk areas require further attention satisfy the discretion and independent judgment test set forth in 5 C.F.R. §551.207(c).

The court is satisfied that Mr. Corrigan clearly meets the professional exemption criteria and therefore, is FLSA-exempt. Mr. Corrigan has not challenged the classification of his position as FLSA-exempt based on the professional exemption. See generally Compl., Pl.'s Resp. Because Mr. Corrigan is not eligible for FLSA overtime as a matter of law, defendant is entitled to judgment. See RCFC 56(c). The court GRANTS defendant's motion for summary judgment with respect to plaintiff's FLSA claims that are not time-barred.

C. Plaintiff's Overtime Claims under FEPA

Defendant argues that, from plaintiff's amended complaint, "it appears that Mr. Corrigan seeks overtime pay pursuant to FEPA, 5 U.S.C. § 5542, if he cannot recover pursuant to FLSA." Def.'s Mot. at 11 (citing Am. Compl. ¶ 2). As defendant points out, plaintiff cannot recover overtime pay under both FLSA and FEPA. Id. (citing 5 U.S.C. § 5542(c)).

FEPA authorizes the Office of Personnel Management (OPM) to "prescribe regulations . . . necessary

for the administration" of the statute. 5 U.S.C. § 5548(a). OPM regulation 5 C.F.R. § 550.111(c) requires that "overtime work . . . be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c) (emphasis added). In Doe, 372 F.3d at 1364, the Federal Circuit made clear that a federal employee cannot recover overtime pay under FEPA without prior written authorization or approval of the overtime work. That the employing agency may have induced the employee to work overtime is not enough. Id.

In this case, plaintiff conceded in his answers to Defendant's First Set of Interrogatories that 141 authorization to work overtime was oral." App. at 466. The parties do not dispute that no written authorization or approval of Mr. Corrigan's overtime work exists and that plaintiff can not satisfy the writing requirement of the OPM regulation for the recovery of overtime pay under FEPA. Based on the undisputed fact, which was set forth in "matters outside the pleadings," that the required writing does not exist, see RCFC 12(b), the court finds that defendant is entitled to judgment as a matter of law and GRANTS summary judgment with respect to plaintiff's claim for overtime pay under FEPA.

D. Plaintiff's Travel Expense Claims

Defendant argues that plaintiffs travel expense claims lack merit. Def.'s Mot. at 25. Defendant asserts that NCUA properly denied the claims and that the General Services Board of Contract Appeals properly sustained the agency's denial of Mr. Corrigan's travel expense claims.[15] Id. at 18.

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[15] As support for Mr. Corrigan's right to appeal NCUA's denial of his travel expense claims to the General Services Board of Contract Appeals, defendant cites 31 U.S.C. § 3702(a)(3). Def.'s Mot. at 18. The cited provision states:

> The Administrator of General Services shall settle claims involving expenses incurred by Federal civilian employees for

Plaintiff asserts that the FTR authorizes him "to travel for personal convenience . . . by an indirect route." Pl.'s Resp. at 3. He argues that under the FTR, his reimbursement is "limited to the cost of travel by a direct route . . . [or] to the constructive cost of the authorized method of transportation." Id. Without citing the source of his quoted authority, Mr. Corrigan defines "[c]onstructive cost [as] the 'sum. of per diem and transportation expenses.'"[16] Id.

The General Services Administration promulgates the FTR. 5 U.S.C. § 5707(a)(1) (2000) (authorizing the "Administrator of General Services [to] prescribe regulations necessary for the administration of [the travel and subsistence expenses of federal employees not employed by the judicial branch of the government]). The FTR, 41 C.F.R. pts. 300-304 (2004), governs "travel by . . . Federal civilian employees . . . authorized to travel at Government expense." 41 C.F.R. § 300-1.1 (2004). The FTR provides that a federal employee is eligible for payment of his or her transportation expenses when performing official travel. Id.

NCUA, Mr. Corrigan's employing agency, has promulgated its own travel manual, see App. 485-501 (NCUA's Travel Manual), consistent with its broad statutory authority, see 12 U.S.C. § 1766(i)(2) (authorizing NCUA "to expend such funds ... [and] make such payments . . . by way of reimbursement . . . as it may deem necessary" to discharge its functions under the governing law). NCUA's

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official travel and transportation, and for relocation expenses incident to transfers of official duty station.

31 U.S.C. § 3702(a)(3).

[16] The cited definition of "constructive cost" appears to come from FTR provision 41 C.F.R. § 301-70.105 (2004). That provision limits an agency's reimbursement to an employee who elects to use a privately-owned vehicle on official travel "to the constructive cost of the [agency] authorized method of transportation, which is the sum of per diem and transportation expenses the employee would reasonably have incurred when traveling by the authorized method of transportation." 41 C.F.R. § 301-70.105(a).

Travel Manual incorporates the provisions of the FTR. App. at 492 (NCUA's Travel Manual, 1-2). In a circumstance where "inconsistencies arise or exist between [NCUA's Travel Manual] and the FTR," the provisions of NCUA's Travel Manual "take[] precedence." Id.

Plaintiff seeks reimbursement for the following travel expenses: (1) a claim for constructive lodging expenses in Seattle, Washington; (2) a rental car claim for Anaheim, California; (3) a lodging and per diem claim for Orlando, Florida; and (4) a lodging and per diem claim for Alexandria, Virginia. Am. Compl. ¶¶ 11-12. In support of his claims Mr. Corrigan points to the guidance provided by NCUA's Travel Manual for preparing a comparative cost statement that compares travel costs incurred with the constructive or hypothetical costs that would have been incurred if the employee had traveled by the least costly route or method. Pl.'s Resp. at 4 (citing NCUA's Travel Manual, [If] 8-6 (addressing travel voucher preparation)). The portion of NCUA's Travel Manual referenced in plaintiff's response instructs an employee to submit a comparative cost statement when traveling, for personal reasons, by an indirect route or by a more expensive method. Id. The court addresses each claim in turn.

1 Plaintiff's Claim for Constructive Lodging Expenses in Seattle, Washington

Because Mr. Corrigan requested his reassignment to a duty station in Seattle, Washington, NCUA did not pay his relocation expenses. App. at 37 (letter of 3/1/02 from Robert E. Blather, Jr., NCUA Director of Region VI, to Corrigan) (stating that "I approve this move. . . . This move will not be paid by NCUA. You are responsible for all moving expenses."). Mr. Corrigan's reassignment to Seattle, Washington became effective on April 8, 2001. App. at 37 (letter of 3/1/02 from Robert E. Blather, Jr., NCUA Director of Region VI, to Corrigan) (stating that "[t]he effective date [of the reassignment] will be April 8, 2001, the beginning of a

pay period"); id. at 38 (Corrigan's voluntary acceptance on 3/3/01 of the reassignment, at his own expense, to become effective on "April 8, 2001"); id. at 39 (Corrigan's Reassignment Notification of Personnel Action Form) (indicating effective date of "4-08-01").

"In advance of his relocation, Mr. Corrigan was detailed [by NCUA] to Seattle and Montana for the period from March 19 to [March 30,] 2001." App. at 123 (NCUA's response brief filed on 12/3/01 in Corrigan's General Services Board of Contract Appeals (GSBCA) appeal); id. at 201 (GSBCA's decision of 12/6/02). Plaintiff drove his personal vehicle to Seattle for his assignment rather than use commercial transportation. Id.; DPFUF 1130. "During his detail in Seattle from March 19, 2001 until March 25, 2001, Mr. Corrigan stayed with relatives in Seattle." DPFUF ¶ 31; App. at 123 (NCUA's response brief filed on 12/3/01 in Corrigan's GSBCA appeal). Plaintiff left his car in Seattle when he completed his assignment in Seattle. DPFUF ¶ 32; App. at 123 (NCUA's response brief filed on 12/3/01 in Corrigan's GSBCA appeal). Mr. Corrigan traveled to Montana for his assignment by commercial transportation and then traveled from Montana back to California by commercial transportation. DPFUF ¶ 32; App. at 123-24 (NCUA's response brief filed on 12/3/01 in Corrigan's GSBCA appeal). Mr. Corrigan submitted a travel voucher seeking, in part, the constructive cost of staying with relatives while on assignment in Seattle. DPFUF ¶ 33; App. at 124-25 (NCUA's response brief filed on 12/3/01 in Corrigan's GSBCA appeal). NCUA denied that claim. DPFUF ¶ 33; App. at 125 (NCUA's response brief filed on 12/3/01 in Corrigan's GSBCA appeal). The GSBCA also denied the claim. App. at 201-05 (GSBCA's decision of 12/6/02).

Section 301-11.12(c) of the FTR permits an agency to reimburse an employee who lodges, with or without charge, with friends or relatives during official travel in the following manner:

> [The employee] may be reimbursed for additional costs [the] host incurs in accommodating [the employee] only if [the employee] [is] able to substantiate the costs and [the employing] agency determines them to be reasonable. [The employee] will not be reimbursed the cost of comparable conventional lodging in the area or a flat "token" amount.

41 C.F.R. § 301-11.12(c). Paragraph 5-4(B)(3) of NCUA's Travel Manual also specifically addresses the issue of reimbursement for lodging with friends or relatives and is substantially similar to the FTR provision, stating:

> When an employee obtains lodging from friends or from relatives, with or without charge, no part of the per diem allowance for lodging will be allowed unless the host actually incurs additional costs in accommodating the traveler. Only additional costs that can be substantiated by the employee and that are determined to be reasonable by NCUA will be allowed. Costs based on room rates for commercial lodging or flat "token" amounts will not be considered reasonable.

App. at 498 (NCUA's Travel Manual, 5-4(B)(3)).

Plaintiff's claim for lodging costs is a claim for "constructive costs." Pl.'s Resp. at 6. Plaintiff's reliance on guidance in NCUA's Travel Manual regarding a comparative cost statement to support his lodging claim is misplaced. See id. at 4 (citing NCUA's Travel Manual, [1] 8-6 (addressing travel voucher preparation)). The applicable NCUA travel regulation limits an employee's reimbursement for lodging with relatives to "additional costs" "actually incur[red]" by the host, "substantiated" by the employee, and found to be reasonably by NCUA. See App. at 498 (NCUA's Travel Manual, 54(B)(3)); accord 41 C.F.R. § 301-11.12(c) (correlative FTR provision). The agency's requirement that actual costs be substantiated and its refusal to accept costs based on rates for commercial rooms make clear that NCUA will not provide reimbursement for lodging with relatives based on constructive costs. See App. at 498 (NCUA's

Travel Manual, ¶ 54(B)(3)). Here, plaintiff has failed to offer any substantiation of additional costs incurred by his relatives in connection with his lodging while on assignment in Seattle. See generally Pl.'s Resp. Instead, he has offered his calculation of constructive costs. Id. at 4. Because plaintiff has failed to support his claim for lodging with relatives while on assignment in Seattle, Washington in accordance with the applicable travel regulations, Mr. Corrigan is not entitled to reimbursement for this claimed travel expense.

2. Plaintiff's Rental Car Claim for Anaheim, California

NCUA detailed plaintiff to Butte, Montana from November 26-30, 2001, sent plaintiff to a training seminar in Anaheim, California, from December 3-7, 2001, and detailed plaintiff to Salt Lake City, Utah, from December 10-14, 2001. App. at 225 (Corrigan's GSBCA appeal of 3/17/03 regarding NCUA's denial of his rental car claim). Mr. Corrigan did not travel back to his permanent duty station, Seattle, Washington on the weekends. Id.; DPFUF ¶ 36. Rather, he stayed with his son in southern California between the assignments preceding and following the training seminar. See App. at 225 (Corrigan's GSBCA appeal of 3/17/03 regarding NCUA's denial of his rental car claim); DPFUF in 36-37. During his weekends in southern California, Mr. Corrigan rented a car without authorization from his supervisor and for his own personal convenience. App. at 225 (Corrigan's GSBCA appeal of 3/17/03 regarding NCUA's denial of his rental car claim); id. at 470 (Comigan's response to defendant's request for admission no. 4); id. at 472 (Corrigan's response to defendant's request for admission no. 10)). Mr. Corrigan sought reimbursement for the car rental costs for the two weekends. App. at 371 (GSBCA's decision of 5/22/03 denying Corrigan's car rental claim). NCUA denied the claim and the GSBCA denied the claim by decision dated May 22, 2003. Id.

Section 301-10.450 of the FTR permits an employee to rent a car when the employing agency "determine[s] that use of a rental vehicle is advantageous to the Government and . . . specifically authorize[s] such use." 41 C.F.R. § 301-10.450. Paragraph 2-8(A) of NCUA's Travel Manual states:

> Rental of vehicles will be approved only when necessary for official business. Situations where rental vehicles may be needed are when other transportation to lodging or the work site is not readily available . . . . Also, rental vehicles may be approved if the cost of available ground transportation exceeds the cost of renting a vehicle. In no case will the rental of a vehicle be approved on the basis of personal off-duty activities.

App. at 493 (NCUA's Travel Manual, ¶ 2-8(A)).

The pertinent travel regulations speak directly to plaintiff's situation involving the unauthorized rental of a vehicle for personal, unofficial use. NCUA's travel regulation explicitly and without exception prohibits the approval of a rental car for "personal off- duty activities." Id. (stating that "[i]n no case" will a car rental be approved for personal non-business use). Because Mr. Corrigan seeks reimbursement for a travel expense that can not be approved under the applicable travel regulations, he can not recover the claimed travel expense.

3. Plaintiff's Lodging and Per Diem Claim for Orlando, Florida

Plaintiff traveled on official business from Seattle, Washington to attend a conference in Orlando, Florida during the period August 11-16, 2002. DPFUF ¶ 42; App. at 439 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging in Orlando, Florida). NCUA "advised the employees traveling to the conference that they could use a discount airline ticket and stay an extra night at a hotel if the combined cost of the extra night at the hotel and the discount airline ticket would result in a savings to the

Government." App. at 439 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging in Orlando, Florida). Mr. Corrigan reserved a one-way ticket from Seattle to Orlando. Id. at 440 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging in Orlando, Florida). He also reserved a one-way return ticket to Seattle from Fort Lauderdale, Florida, not Orlando, on August 24, 2002, eight days after his official business ended in Orlando. Id. Mr. Corrigan does not dispute that his trip to Fort Lauderdale was for personal reasons. Id. at 480 (Corrigan's response to defendant's request for admission no. 38).

"Because Mr. Corrigan was able to obtain a discounted airline ticket to Orlando, NCUA paid for an additional night of lodging for him in Orlando [the night] before the conference began." Def.'s Mot. at 22; see also Def.'s Reply at 11; App. at 439-40 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging in Orlando, Florida). Accordingly, on August 10, 2002, the night before the conference in Orlando began, and during the conference in Orlando, Mr. Corrigan stayed at the Wyndham Palace at the agency's expense. App. at 440 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging in Orlando, Florida). The hotel billed the lodging costs directly to NCUA at a rate of $99 per night, and the agency paid the billed lodging costs. See id.

On August 16, 2002, the last day of the conference in Orlando, Mr. Corrigan traveled to Fort Lauderdale and spent the night at a Holiday Inn Express en route. Id. Mr. Corrigan sought reimbursement for his lodging at the Wyndham Palace on August 10, 2002, the night before the conference, submitting a claim for a lodging expense of $125. Id. He also sought reimbursement for his lodging at the Holiday Inn Express during his personal travel to Fort Lauderdale, Florida. Id. NCUA denied plaintiff's claims for these lodging expenses and, by decision dated October 3, 2003, the GSBCA also denied plaintiff's claims. Id. at 440, 442-43

(GSBCA's decision of 10 3 03 denying Corrigan's claims for lodging in Orlando, Florida).

Without citing to a particular regulation, Mr. Corrigan argues that "[b]ased on a cost comparison between actual and constructive costs, the agency should have paid [him] for [his] full claim under the Federal Travel Regulations." Pl.'s Resp. at 8. He contends that "the FTR is binding while the NCUA Travel Manual is not." Id.

Plaintiff's request for reimbursement based on a cost comparison between actual and constructive costs is not supported under the applicable law. And, contrary to plaintiff's contention, the provisions of both the FTR and NCUA's Travel Manual govern. See App. at 492 (NCUA's Travel Manual, ¶ 1-2) (stating that the provisions of the FTR are incorporated into NCUA's Travel Manual). Section 301-11.100 of the FTR provides that "[w]hen . . . overnight lodging is required [, an employee] [is] reimbursed [his or her] actual lodging cost not to exceed the maximum lodging rate for the [temporary duty] location or stopover point." 41 C.F.R. § 301-11.100 (emphasis added). Paragraph 5-4(A)(4) of NCUA's Travel Manual states:

> For each full calendar day . . . the employee is in travel status and lodging is required, the actual cost of lodging incurred by the traveler, up to the maximum allowed, will be added to the applicable M&IE [(meals & incidental expenses)] rate.

App. at 497 (NCUA Travel Manual, ¶ 5-4(A)(4)(b)) (emphasis added).

The applicable travel regulations limit reimbursement for lodging expenses to the "actual cost" incurred by an employee on official travel. Because Mr. Corrigan's lodging expense of $99 for the night of August 10, 2002 at the Wyndham Palace was directly billed to NCUA and paid by NCUA, he cannot recover his claimed lodging expense of $125 for that night.

Section 301-2.4 of the FTR also provides that an employing agency "will not pay for excess costs resulting from

circuitous routes, delays, or luxury accommodations or services unnecessary or unjustified in the performance of official business." 41 C.F.R. § 301-2.4 (emphasis added). Paragraph 5-4 of NCUA's Travel Manual provides guidance regarding "[t]he per diem allowances authorized for all official travel . . . [which are to] be computed under the lodgings-plus M&IE [(meals & incidental expenses)] system described [more particularly in the related subparagraphs]." App. at 497 (NCUA Travel Manual, ¶ 5-4(A)) (emphasis added).

The applicable travel regulations limit reimbursement for lodging expenses to expenses incurred during travel for official business. Mr. Corrigan does not dispute that his travel to Fort Lauderdale, and therefore his lodging at the Holiday Inn Express while traveling to Fort Lauderdale, was for personal reasons. Because Mr. Corrigan's lodging expense at the Holiday Inn Express was not in connection with any official travel, that claimed expense is not reimbursable.

4. Plaintiff's Lodging and Per Diem Claim for Alexandria, Virginia.

On September 29, 2002, plaintiff traveled on official business from Seattle to Alexandria, Virginia to attend a training session that was to run from September 30, 2002 until noon on October 4, 2002. App. at 440 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging and per diem expenses in Alexandria, Virginia). On October 2, 2002, Mr. Corrigan communicated by e-mail with his supervisor about his return travel to Seattle. Id. Mr. Corrigan advised his supervisor that, although there was a non-stop flight from Dulles International Airport to Seattle on the afternoon of October 4, 2002, he would not take that flight based on his experience that Dulles was "not pleasant." Id. at 440-41. Mr. Corrigan further advised his supervisor that he planned to return to Seattle on the morning of October 5, 2002 from Reagan National Airport. Id. at 441. Plaintiff's supervisor advised Mr. Corrigan that the agency would not authorize the

reimbursement of lodging expenses for the night of October 4, 2002 because plaintiff "had ample time to return to Seattle on the afternoon of October 4[, 2002]." Id. Plaintiff does not dispute that there were at least two non-direct flights from Reagan National
Airport to Seattle on the afternoon of October 4, 2002 and that there was at least on nonstop flight from Dulles International Airport to Seattle on the afternoon of October 4, 2002. Id.; see also generally Pl.'s Resp.

Mr. Corrigan took annual leave for the afternoon of October 4, 2002. App. at 441 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging and per diem expenses in Alexandria, Virginia). He spent the night in the Washington, DC area and incurred lodging expenses for the night of October 4, 2002. Id. He returned to Seattle on October 5, 2002. Id. Mr. Corrigan sought reimbursement for lodging and per diem expenses for the night of October 4, 2002 and reimbursement for meals and incidental expenses (M&IE) for October 5, 2002. Id. NCUA denied his claim for lodging expenses on the night of October 4, 2002 and for M&IE on October 5, 2005. Id. By decision dated October 3, 2003, the GSBCA also denied his claim. Id. at 443 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging and per diem expenses in Alexandria, Virginia).

Mr. Corrigan argues that his claimed expenses for lodging on the night of October 4, 2002, and for per diem on October 5, 2002, "relate to a situation that required [him] to work from 8:00 am to 11:00 pm." Pl.'s Resp. at 8. Citing section 301-11.20 of the FTR, he asserts that he "was entitled to take an overnight break." Id. (citing 41 C.F.R. § 30111.20).

Section 301-11.20 of the FTR provides, in pertinent part, that an employing agency "may authorize a rest period not in excess of 24 hours at either an intermediate point or at [an employee's] destination if . . . [t]ravel is by a direct or usually traveled route." 41 C.F.R. § 301-11.20(a)(3). Here, plaintiff acknowledges that NCUA did not authorize his

overnight break. See Pl.'s Resp. at 8 (stating that "[t]he agency refused to pay for the break").

The FTR provides that an employing agency "will not pay for excess costs resulting from circuitous routes, delays, or luxury accommodations or services unnecessary or unjustified in the performance of official business." 41 C.F.R. § 301-2.4 (emphasis added). The GSBCA has specifically considered and denied a claim for the reimbursement of travel expenses that was substantially similar to plaintiff's claim here, holding that:

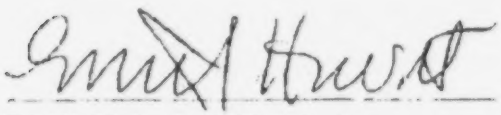
> An employee who delays his return from a temporary duty (TDY) assignment . . . may not be reimbursed for lodging the night before his return at a hotel near the airport because he was not in official TDY status on the evening he incurred the lodging expense, and the delay in his return was for personal convenience.

Leo Bosner, GSBCA No. 15855-TRAY, 2003-1 B.C.A. (CCH) 1132,234, 2003 GSBCA LEXIS 64, at *1 (Mar. 28, 2003). Mr. Corrigan's delay in returning to Seattle was for his personal convenience. The expenses he incurred for lodging on the night of October 4, 2005 and for meals and incidentals on October 5, 2004 were not in furtherance of official business and were not approved. Prior to incurring the claimed travel expenses, Mr. Corrigan learned from his supervisor that the expenses incurred for an overnight stay in Washington, DC would not be approved on the ground that plaintiff "had ample time to return to Seattle on the afternoon of October 4[, 2002]." App. at 440 (GSBCA's decision of 10/3/03 denying Corrigan's claims for lodging and per diem expenses in Alexandria, Virginia). The applicable travel regulation and persuasive case law prohibit the reimbursement of Mr. Corrigan's claimed lodging and per diem expenses in Alexandria, Virginia.

As a matter of law, Mr. Corrigan is not entitled to reimbursement for any of his claimed travel expenses. Accordingly, defendant is entitled to summary judgment on these claims.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss is GRANTED with respect to plaintiff's FLSA overtime claims that accrued three years before the filing of the complaint. Defendant's motion for summary judgment is GRANTED with respect to plaintiff's remaining FLSA overtime claims, with respect to plaintiff's FEPA overtime claims and with respect to plaintiff's travel expense claims. The Clerk of the Court is directed to ENTER JUDGMENT for defendant. No costs.
IT IS SO ORDERED.



EMILY C. H WITT Judge
SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

John L. Corrigan,
Plaintiff,
v.
The United States,
Defendant

Motion for Reconsideration; Rule of the Court of Federal Claims (RCFC) 59; Equitable Tolling; Continuing Claims Doctrine; Whether Failure to Raise Issue on Summary Judgment Prevents Party From Raising Issue on Reconsideration; Whether Decisions of the General Services Board of Contract Appeals (GSBCA) Bind This Court; Whether Status Exempting Application of Overtime Provisions of Fair Labor Standards Act (FLSA) Includes Application of Exemption to Overtime Travel Claims

John L. Corrigan, Auburn, WA, pro se.

Dawn S. Conrad, with whom were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Kathryn A. Bleecker, Assistant Director, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, for defendant. Kathy M. Sachen-Gute, National Credit Union Administration, of counsel.

OPINION AND ORDER

HEWITT, Judge

Before the court is Plaintiffs Motion for This Court's Reconsideration Dismissing Plaintiffs Claims on Summary Judgment (Pl.'s Mot.) and the following responsive briefing: Defendant's Response to Plaintiffs Motion for Reconsideration (Def.'s Resp.) and Plaintiffs Reply to

Defendant's Response to Plaintiffs Motion for This Courts Reconsideration (Pl.'s Reply). Plaintiff moves for reconsideration of this court's opinion in Corrigan v. United States, 68 Fed. Cl. 589 (2005). In its opinion, the court held that plaintiff's Fair Labor Standards Act (FLSA) claims that accrued more than three years before the filing of plaintiff's complaint were time-barred. Corrigan, 68 Fed. Cl. at 593; that plaintiff's remaining FLSA claims were barred because his position as a CU-11 examiner was classified as FLSA-exempt based on the professional exemption, id. at 595; that plaintiff's Federal Employee Pay Act (FEPA) overtime claims were barred because plaintiff did not obtain prior written approval as required by 5 C.F.R. § 550.111(c), id. at 596; and that plaintiff was ineligible for reimbursement of his travel expense claims under the Federal Travel Regulations (FTR) and the National Credit Union Administration (NCUA) Travel Manual, id. at 601. Plaintiff's motion for reconsideration consists of the following. First, requesting the court to reconsider plaintiff's time-barred FLSA claims, plaintiff introduces the new arguments that his time-barred claims are "subject to "equitable tolling' and that" the "continuing claims doctrine applies."[1] Pl.'s Mot. at 5. Second, requesting the court to reconsider plaintiff's remaining FLSA claims, plaintiff reiterates his argument that he is

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[1] Plaintiff also reiterates the argument that his overtime claims under the FLSA are governed by the Contract Disputes Act (CDA). Pl.'s Mot. at 4. The court addressed this question of law in its 2005 opinion in this case (Opinion). See Corrigan v. United States, 68 Fed. Cl. 589, 592 (2005). There, citing Chu v. United States, 773 F.2d 1226, 1229 (Fed. Cir. 1985), the court stated:

> Nor is plaintiffs case governed by the CDA. Mr. Corrigan was appointed to his position with NCUA, and it is well-established that "federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government."

Corrigan, 68 Fed. Cl. at 593 (quoting Chu, 773 F.2d at 1229)

subject to the FLSA, rather than exempt from it, despite his position as a CU-11 credit union examiner. Id. at 5-6. Third, plaintiff reiterates his argument that "[t]he FEPA and FLSA are in pan materia" and that "under both [the FLSA and FEPA,] covered employees must be paid when working overtime." Id. at 5. Finally, plaintiff argues that the court erred in its analysis of plaintiff's travel expense claims because the court did not follow the process articulated by the General Services Board of Contract Appeals (GSBCA) in Thurman, GSBCA No. 15562-TRAY, 01-2 BCA 1131516, 2001 WL 748223 (G.S.B.C.A. June 27, 2001), and, further, that the court erred by deciding the travel claims on summary judgment because the GSBCA allegedly applies an inconsistent approach to "personal convenience" travel expense claims, so that the court is not empowered to adopt one approach over another. Id. at 1-4. For the reasons detailed below, plaintiff's motion for reconsideration is DENIED.

I. Background[1]

Plaintiff, a credit union examiner for the NCUA, filed a complaint with this court on October 20, 2004, and an amended complaint on March 7, 2005, seeking reimbursement for overtime pay and travel expenses allegedly incurred in connection with his professional duties. Specifically, Mr. Corrigan sought overtime pay for travel during non-working days and beyond the forty-hour work week from December 1, 1999 to present and from December 1, 2000 to present and reimbursement for the following travel expenses: the constructive cost of lodging in Seattle when he stayed with relatives because of voluntary and requested reassignment there; costs of car rental on weekends between business travel in Anaheim, California;

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[1] A full recitation of the facts is set out in Corrigan, 68 Fed. Cl. at 589-91.

costs of lodging and per diem expenses between business engagements in Orlando, Florida; and lodging and per diem expenses incurred in Alexandria, Virginia after a conference there. Mr. Corrigan began working for NCUA as a CU-9 examiner on November 14, 1999 and was promoted to the position of CU-11 credit examiner effective January 14, 2001. Corrigan, 68 Fed. Cl. at 591. NCUA classified his CU-9 position as non-exempt and his CU-11 position as exempt from the provisions of the FLSA.[19] Id. Mr. Corrigan concedes that he did not obtain prior written authorization for his overtime work; rather, "all authorization to work overtime was oral." Id. at 596.

On August 5, 2005, defendant filed its Motion to Dismiss and Motion for Summary Judgment (Def.'s Mot. or Defendant's Motion).[20] Responsive briefing followed.[21] In an Opinion and Order (Opinion) dated November 15, 2005, the court granted defendant's motion, holding that plaintiff's claims that had accrued prior to October 21, 2001 were time-barred, Corrigan, 68 Fed. Cl. at 593; that plaintiff's position as a CU-11 credit examiner rendered him ineligible for plaintiff's remaining overtime claims under the FLSA pursuant to the FLSA's

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[19] The court reviewed and affirmed NCUA's and the Office of Personnel Management's (OPM's) determination of Mr. Corrigan's non-exempt status on the basis of a professional exemption when he occupied the position of CU-11 credit examiner. Corrigan, 68 Fed. Cl. at 593-95.

[20] Defendant's Motion was accompanied by Defendant's Proposed Findings of Uncontroverted Fact (DPFUF).

[21] In response to Defendant's Motion, plaintiff filed Plaintiff's Response to Dismiss and Motion for Summary Judgment (Pl.'s Resp.) accompanied by Plaintiff's Response to Proposed Findings of Uncontroverted Fact (Pl.'s Facts) on September 16, 2005, and defendant filed Defendant's Reply in Support of Its Motion to Dismiss and Motion for Summary Judgment (Def.'s Reply) on September 23, 2005.

professional exemption, id. at 595; that the fact that plaintiff did not obtain prior written approval for overtime work rendered him ineligible to receive overtime pay under FEPA, id. at 596; and that plaintiff was ineligible as a matter of law to receive reimbursement for his travel expense claims under the rules contained in the Federal Travel Regulations (FTR) and the NCUA Travel Manual, id. at 601. Plaintiff now requests reconsideration of the court's determinations of those issues. Pl.'s Mot. at 1-7. The court considers plaintiff's request in accordance with the standards of Rule 59 of the Rules of the Court of Federal Claims (RCFC).

II Standard of Review

RCFC 59(a)(1) affords this court discretion to grant reconsideration "to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC 59(a)(1); see Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir. 1990) ("The decision whether to grant reconsideration lies largely within the discretion of the district court."). A party "does not persuade the court to grant . . . [a] motion [for reconsideration] by merely reasserting arguments which were previously made and were carefully considered by the court." Henderson County Drainage Dist. No. 3 v. United States, 55 Fed. Cl. 334, 337 (2003). In addition, by failing to raise an issue when it is first available to be litigated, a party waives consideration by the court of the issue on reconsideration, even when the party is pro se. Lamle v. Mattel, Inc., 394 F.3d 1355, 1359 n.1 (Fed. Cir. 2005) (holding that pro se party had waived issue where party had first raised issue on motion for reconsideration); Abbott Labs. v. Syntron Bioresearch, Inc., 334 F.3d 1343, 1355 (Fed. Cir. 2003) (holding that party had waived issue by failing to raise

issue in opening brief); Seldovia Native Ass'n, Inc. v. United States, 36 Fed. Cl. 593, 594 (1996) ("[A] motion for reconsideration ... should not be based on evidence that was readily available at the time the motion was heard."); see Bishop v. United States, 26 Cl. Ct. 281, 286 (1992) (a motion for reconsideration "is not intended to give an unhappy litigant an additional chance to sway the court"). "To prevail on a motion for reconsideration, the movant must point to a manifest error of law or mistake of fact." Pac. Gas & Elec. Co. v. United States, 58 Fed. Cl. 1, 2 (2003). Specifically, the moving party must show: (1) the occurrence of an intervening change in the controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of allowing the motion to prevent manifest injustice. Griswold v. United States, 61 Fed. Cl. 458, 460-61 (2004). "A motion for reconsideration 'enables a trial court to address oversights, and the court appreciates the opportunity to do so.'" Cane Tenn., Inc. v. United States, 62 Fed. Cl. 703, 705 (2004) (quoting Fm-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 315 (1999)).

III. Discussion

A. Plaintiff's Overtime Claims Under the FLSA

In Corrigan, the court held that plaintiff's FLSA overtime claims that accrued prior to October 20, 2001 were barred by the statute of limitations.[22] Corrigan, 68 Fed. Cl. at 593. In the original briefing, plaintiff argued

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[22] October 20, 2001 is three years prior to the date plaintiff's complaint was filed. The FLSA statute of limitations is generally two years but is three years for willful violations of the statute. 29 U.S.C. § 255(a) (2000). For purposes of its Opinion, the court assumed without deciding that the applicable statute of limitations was three years. See Corrigan, 68 Fed. Cl. At 593.

that his overtime claims that accrued prior to October 20, 2001 were not time-barred because he had submitted a first stage grievance to NCUA on January 20, 2002. Pl.'s Resp. at 1; see Corrigan, 68 Fed. Cl. at 592. In his motion for reconsideration, plaintiff argues for the first time that his time- barred FLSA overtime claims are subject to equitable tolling.[23] Pl.'s Mot. at 5. Plaintiff does not argue that there has been an intervening change in the controlling law or that he has discovered new evidence not available at the time of original briefing. See id. Rather, plaintiff bases his argument on the fact that he had submitted his first stage grievance to the agency on January 20, 2002. Id. In support of his position, plaintiff quotes the following language in Wells v. United States, 420 F.3d 1343 (Fed. Cir. 2005): "[T]he Supreme Court suggested that equitable tolling would apply 'where the claimant has actively pursued his judicial remedies . . . .'" Id. In the alternative, plaintiff argues that his "overtime claims were ongoing and [subject to] the 'continuing claims doctrine . . . ." Id. at 5. Arguing that these claims present "material issues," plaintiff argues that summary judgment was inappropriate. Id.

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[23] Plaintiff also reiterates his argument set forth in his original briefing that the statute of limitations did not begin to run "until after the administrative determination." Pl.'s Reply at 2. Plaintiff argued that the filing of his claim with the administrative agency, NCUA, tolled the statute of limitations, and that the statute did not begin to run again until a final determination was reached. Pl.'s Resp. at 1. The court addressed this issue in Corrigan. There, the court stated, "Contrary to Mr. Corrigan's assertions, the filing of his NCUA grievance, an administrative claim, 'does not toll the statute of limitations imposed by section 255(a).' Corrigan, 68 Fed. Cl. at 593 (quoting Hickman, 10 Cl. Ct. at 552). Because plaintiff merely reiterates his prior argument on reconsideration without pointing to an intervening change in the controlling law, previously unavailable evidence, or resulting manifest injustice, plaintiff has not articulated a basis for reconsideration.

Defendant argues, citing White Mountain Apache Tribe of Ariz. v. United States, 9 Cl. Ct. 32, 34 (1985), that plaintiffs "arguments are not based upon any new law or new evidence, and therefore, are not proper grounds for reconsideration." Def.'s Resp. at 9. Defendant also argues that the continuing claims doctrine does not apply to FLSA claims to extend the limitations period beyond three years, id. at 10, and that equitable tolling is inapplicable to Mr. Corrigan's claim because plaintiff's claim filed with OPM was not "a defective pleading filed during the statutory period," id. at 11, because the government put Mr. Corrigan on notice that he was not eligible for overtime by classifying his position as exempt, id. at 10-11, and because plaintiff "was not led to believe that he would be paid overtime for travel," id. at 11.[24]

To the extent that plaintiffs equitable tolling argument is a mere reassertion of his argument on summary judgment or a disagreement with the law governing time of accrual of claims, the court declines to reconsider plaintiffs claim. As the court stated in Corrigan, "[A] claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid." Corrigan, 68 Fed. Cl. at 592-93 (quoting Cook v. United States, 855 F.2d 848, 851 (Fed. Cir. 1988). In addition, to the extent that plaintiffs equitable tolling and continuing claims doctrine arguments present new legal theories which could have been asserted during briefing on summary judgment, the court also declines to consider plaintiffs claims. Because plaintiff uses the same facts on which to base his new legal theories, he could have argued these new legal theories at the summary judgment stage. Plaintiff does not assert "a manifest error of law or mistake of

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[24] Defendant also argues that "Mr. Corrigan's filing of an administrative claim does not constitute a defective pleading because OPM had the authority to grant the relief that he requested, and his filing with OPM was not a mandatory prerequisite to judicial relief." Def.'s Mot. at 11.

fact" which would entitle him to reconsideration.[25] See Pac. Gas, 58 Fed. Cl. at 2. Furthermore, failure to reconsider plaintiffs claim would not cause manifest injustice. Accordingly, the court declines to reconsider plaintiffs claims.

Even if the court were to reconsider plaintiffs claims on the merits, however, plaintiff would not prevail. Equitable tolling, though available in suits against the government, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990) (holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States"), is "an exceptional remedy, reserved for extraordinary circumstances, which '[f]ederal courts have typically extended ... only sparingly.'" O'Connell v. Sec'y of HHS, 63 Fed. Cl. 49, 63 (2004) (quoting Irwin, 498 U.S. at 96 (1990)). Federal courts have equitably tolled a statute in cases "where the claimant has pursued his judicial remedies by filing a defective pleading during the statutory period," Irwin, 498 U.S. at 96, "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," id., or where the claimant's damages were "inherently unknowable." Japanese War Notes Claimants Ass'n v. United States, 178 Ct. Cl. 630, 634 (1967); see Nerseth v. United States, 17 Cl. Ct. 660, 665 (1989) ("Application of th[e] doctrine [of equitable tolling] requires that a plaintiff [be] excusably unaware of the existence of his cause of

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[25] Plaintiff also argues that his newly asserted legal theories constitute "material issues" so that summary judgment was inappropriate. Pl.'s Mot. at 5. A court may not decide a case on summary judgment where issues of material fact exist. RCFC 56(c); Aeredano v. United States, -- Fed Cl. -- -- (2006), 2006 WL 800758, at *3. A fact is defined as material if it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The court notes that plaintiff's arguments are legal arguments and do not constitute issues of material fact which might affect the outcome of the suit.

action at the time it accrues."). Courts have been reluctant equitably to toll the statute of limitations where the claimant "failed to exercise due diligence in preserving his legal rights." Irwin, 498 U.S. at 96.

At the outset, in order for plaintiff to prevail, the statute pursuant to which plaintiff claims relief must be subject to equitable tolling. See Irwin, 498 U.S. at 96; Arakaki v. United States, 62 Fed. Cl. 244, 250-51 (2004). The Federal Circuit has stated in dicta in Cook v. United States, 795 F.2d 987 (Fed. Cir. 1986), that "[w]hen and if the time comes, the district court will presumably apply the doctrine of equitable tolling consistently with Congress' intent in enacting the particular statutory scheme set forth in FLSA." Cook, 795 F.2d at 994. This court and its predecessor, however, have stated only in dicta whether congressional intent supports the application of equitable tolling to the FLSA. Compare Doyle v. United States, 20 Cl. Ct. 495, 499-500 (1990) (stating that equitable tolling is unavailable for willful violations because Congress has already provided an extension of the limitations period for those violations), aff'd Doyle v. United States, 931 F.2d 1546, 1549-50 (Fed. Cir. 1991) with Christofferson v. United States, 64 Fed. Cl. 316, 326 (2005) (stating that "the weight of authority favors equitable tolling of FLSA claims"); see also Ewer v. United States, 63 Fed. Cl. 396, 402 (2004) (stating that "the FLSA limitations period is not a statute of repose; thus, the principles of equitable tolling apply" but declining equitably to toll the statute). The court has once held in an unpublished order, repeated in a published decision, that the FLSA is subject to equitable tolling. Hickman v. United States, 43 Fed. Cl. 424, 427 (1999). The court need not decide whether the FLSA is subject to equitable tolling, however, because plaintiff has not pleaded facts that would entitle him to equitable tolling of the statute.

Plaintiff argues that the court should equitably toll the statute because plaintiff filed a claim with NCUA on

January 20, 2002.[26] See Pl.'s Mot. at 5. Plaintiff seems to argue that his claim filed in this court should relate back to his claim filed with the agency. See id. Filing an administrative claim, however, does not toll the statute of limitations, as stated in Corrigan, 68 Fed. Cl. at 593 ("Contrary to Mr. Corrigan's assertions, the filing of his NCUA grievance, an administrative claim, 'does not toll the statute of limitations imposed by [29 U.S.C.] section 255(a).'") (quoting Hickman, 10 Cl. Ct. at 552); see also Nerseth, 17 Cl. Ct. at 665 (1989), and is not a necessary prerequisite to filing a claim in this court, id. ("There is nothing in the language of the Act that would support plaintiffs' belief that the pursuit of administrative relief is a prerequisite to bringing an action in this Court."). Nor is the filing of an administrative claim a basis for equitable tolling of the statute. See Irwin, 498 U.S. at 95-96. Plaintiff's filing of an administrative claim does not amount to "pursu[ing] [plaintiff's] judicial remedies by filing a defective pleading during the statutory period." as articulated by Irwin as a basis for equitable tolling, id. at 96; plaintiff did not attempt to file a complaint in this or any court until October 20, 2004. Rather, this is a case of plaintiff's "fail[ing] to exercise due diligence in preserving his legal rights." Id. "[I]gnorance of rights which should have been known is not enough to toll their running." Braude v. United States, 218 Ct. Cl. 270, 278 (1978); Japanese War Notes, 178 Ct. Cl. at 634. Because plaintiff has not

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[26] In his original briefing, plaintiff argued that the statute of limitations did not begin to run until after the administrative determination. Pl.'s Resp. at 1. Although plaintiff uses the term "equitable tolling" in his motion for reconsideration, plaintiff does not argue any of the bases on which a statute of limitations may be equitably tolled, and plaintiff reiterates the argument set forth in his original briefing, that the statute of limitations did not begin to run until after the administrative determination was reached. Pl.'s Reply at 2

demonstrated an "extraordinary circumstance[]," O'Connell, 63 Fed. Cl. at 63, warranting equitable tolling of the FLSA, the court declines equitably to toll plaintiff's overtime claims under the statute.

Plaintiff also cannot successfully assert the continuing claims doctrine to preserve his overtime claims that accrued prior to October 21, 2001. "In order for the continuing claim doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." Brown Park Estates-Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed. Cir. 1997). Under the continuing claims doctrine, each violation begins the limitations period anew, Friedman v. United States, 310 F.2d 381, 385 (Ct. Cl. 1962) ("[W]here the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought."), and the plaintiff is entitled to recover for each violation that accrues within the limitations period, Brown Park, 127 F.3d at 1457-58. Plaintiff's case presents the classic example of the continuing claims doctrine. The continuing claims doctrine permits plaintiff to assert a new claim each time overtime compensation was excluded from his paycheck. Beebe v. United States, 640 F.2d 1283, 1293 (Ct. Cl. 1981). The court has already applied the continuing claims doctrine to plaintiff's claims, however, in Corrigan. There, the court considered the merits of plaintiff's claims that accrued after October 21, 2001. This is the relief to which plaintiff is entitled under the continuing claims doctrine. Plaintiff cannot recover damages beyond the FLSA limitations period. See Ewer v. United States, 63 Fed. Cl. 396, 400-401 (2004) (holding that, although the continuing claims doctrine applied to plaintiffs' military pay claims, plaintiffs could not recover damages beyond the FLSA limitations period). Plaintiff therefore is not entitled to

reconsideration of his overtime pay claims accruing prior to October 21, 2001.

Plaintiff is also not entitled to reconsideration of his overtime pay claims accruing on or after October 21, 2001. Plaintiff argues that he is subject to the provisions of the FLSA because "[t]he FLSA does not allow the agency to put me in th[e] position [of not receiving overtime pay for travel time beyond the forty-hour work week]." Pl.'s Mot. at 5. Plaintiff explains,

> The FLSA requires the agency to provide a 40 hour work week. The FLSA gives the agency the option of having my travel time within that 40 hour work week, or to give me compensatory time for travel. However, in violation of the FLSA, the agency does neither. It then claims that they don't have to pay me for this work. That is in violation of the FLSA.[27]

Id. Although plaintiff concedes that "the court may be right that I am exempt from the FLSA overtime rules," id. at 6, plaintiff argues that "the FLSA is more than just overtime – and therefore, other parts of the FLSA apply to me," id.

Defendant argues that, "[i]n his motion for reconsideration, Mr. Corrigan raises the same arguments that he raised in his response to the Government's motion to dismiss and motion for summary judgment," Def.'s Resp. at 11, and that "RCFC 59 'may not be used to relitigate legal issues previously considered and resolved by the court.' Id.

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[27] "To the extent that plaintiff raises new travel expense claims beyond those under consideration on summary judgment, the court declines to consider those claims. Plaintiff may not allege additional complaints on a motion for reconsideration; any claims not asserted at the time of initial briefing are waived. Lamle, 394 F.3d at 1359 n.1 (holding that pro se party had waived issue where party had first raised issue on motion for reconsideration); Abbott, 334 F.3d at 1355 (holding that party had waived issue by failing to raise issue in opening brief); Seldovia, 36 Fed. Cl. at 594 ("[A] motion for reconsideration . . . should not be based on evidence that was readily available at the time the motion was heard.").

at 11-12 (quoting Fla. Power & Light Co. v. United States, 66 Fed. Cl. 93, 96 (2005)). Defendant continues. "'[a] movant may not merely recapitulate cases and arguments considered by the court before rendering its original decision.' Id. at 12 (quoting Fla. Power, 66 Fed. Cl. at 96). Defendant also argues that "Mr. Corrigan cannot recover overtime pay for time he spends on business travel outside of the 40-hour work week because he is exempt from the overtime provisions of FLSA." Id. Defendant argues that, in finding Mr. Corrigan FLSA-exempt, "this [c]ourt properly applied the test for the professional exemption." Id.

Mr. Corrigan's argument that, even if FLSA-exempt, he could not be exempt from all provisions of the FLSA reiterates the argument he made in his original briefing. Compare Pl.'s Mot. at 6 with Pl.'s Resp. at 2-3. In his original briefing, plaintiff argued, "I am only exempt from certain provisions of the FLSA .." Pl.'s Resp. at 2. As the court stated in its Opinion in Corrigan, "Mr. Corrigan has identified no authorities which support his view that he is 'only exempt from certain provisions of the FLSA' and the court is not aware of any legal support for Mr. Corrigan's view." 68 Fed. Cl. at 593. Plaintiff may not, on a motion for reconsideration, re-litigate issues already decided by the court in its opinion on original briefing. Henderson County, 55 Fed. Cl. at 337. Accordingly, the court declines to reconsider plaintiff's claims for overtime travel accruing on or after October 21, 2001.[28]

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[28] Even if the court were to reconsider the merits of plaintiff's claims for overtime travel that accrued on or after October 21, 2001, plaintiff's overtime claims would fail because plaintiff was exempt from the overtime provision of the FLSA under the professional exemption while he worked in the position of CU-11 credit union examiner. Corrigan, 68 Fed. Cl. at 595 ("The court finds, as did NCUA and OPM, that Mr. Corrigan's work as a CU-11 credit union examiner met the criteria for the professional exemption from FLSA coverage."). For covered

employees, the FLSA prescribes maximum hours beyond which overtime pay is due. Section 207(a)(1) of 29 U.S.C. provides: 29 U.S.C. § 207(a)(1) (2000). The FLSA exempts certain employees from the overtime provision. 29 U.S.C. § 213 provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(a) The provisions of . . . section 207 of this title shall not apply with respect to —
(1) any employee employed in a bona fide executive, administrative, or professional capacity ..
29 U.S.C. § 213(a)(1) (2000).

Plaintiff appears to argue that claims for overtime pay for travel beyond the forty-hour work week are not claims for overtime, and that plaintiff is therefore not exempt from those provisions. Pl.'s Mot. at 6. To the extent that claims for overtime pay for travel beyond the forty-hour work week can be distinguished from overtime pay for overtime work, however, overtime pay for travel is less available than overtime pay for overtime work. See, e.g., 29 C.F.R. § 785.39 (2005) (regulating the availability of overtime pay for travel). Even for employees eligible for overtime pay under the FLSA, overtime pay is generally not available for travel time spent beyond the normal work day, even to or from sites away from the employee's home community. 29 C.F.R. § 785.39 ("[T]he Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours .. . ."); accord Imada v. City of Hercules, 138 F.3d 1294, 1297 (9th Cir. 1998). The exception to this rule, for non-exempt employees, is for travel occurring during an employee's regular working hours on non-working days. 29 C.F.R. § 785.39.
Even to the very limited extent that overtime pay for travel time beyond the forty-hour work week is available to employees covered by the FLSA, however, that overtime pay is not available to plaintiff because plaintiff is FLSA-exempt. Furthermore, plaintiff states a claim for overtime pay — which is not somehow a different animal on account of its being a claim for overtime travel. Accordingly, Mr. Corrigan is ineligible to receive overtime pay under the FLSA for overtime hours worked or for travel beyond the forty-hour work week.

B. Plaintiff's Overtime Claims Under FEPA

Plaintiff reiterates his arguments set forth in his original briefing that FEPA and the FLSA are "in pan materia" and that "under both statutes covered employees must be paid when working overtime." Compare Pl.'s Mot. at 5 with Pl.'s Resp. at 2. In its original briefing, defendant, citing 5 U.S.C. § 5542(c), correctly pointed out that plaintiff cannot recover overtime pay under both the FLSA and FEPA. Def.'s Mot. at 11; Def.'s Reply at 5; 5 U.S.C. § 5542(c); Corrigan, 68 Fed. Cl. at 596. On reconsideration, the court reaffirms its conclusion that plaintiff is ineligible to receive overtime pay under the FLSA. Corrigan, 68 Fed. Cl. at 593, 595; supra, Part II.A. Plaintiff is also ineligible to receive overtime pay under FEPA because plaintiff did not obtain prior written approval of overtime work, as required by OPM regulation 5 C.F.R. § 550.111(c). Corrigan, 68 Fed. Cl. at 596. In that sense, plaintiff's statement that "under [FEPA], covered employees must be paid when working overtime," Pl.'s Mot. at 5, is overly broad. FEPA does not apply to plaintiff's claims. Because plaintiff has merely reiterated an argument
made in his original briefing without alleging or basing the argument on discovery of new evidence or a change in applicable law, the court declines to reconsider plaintiff's overtime claims under FEPA.

C. Plaintiff's Travel Expense Claims

Plaintiff requests reconsideration of his travel expense claims. Pl.'s Mot. at 1-4, 6. Plaintiff first argues that GSBCA has taken an inconsistent approach to personal convenience claims, so that it is inappropriate for the court to

adopt one approach over the other. Id. at 1-2. Plaintiff also argues that the court's analysis of plaintiff's travel expense claims was improper because (1) the court failed to follow the process articulated by GSBCA in Thurman, id. at 2-3, and (2) the court failed to compare the total constructive cost[29] of plaintiff's travel expenses with the total actual cost, id. Finally, plaintiff argues that "even if this court [had] properly determined [the steps of the process articulated by GSBCA in Thurman], it would still be improper for the court to [decide the case at the] summary judgment [stage] - because this is a material issue and one that should not be [decided on] summary judgment." Id. at 3.

Defendant argues that "Mr. Corrigan raises no new legal argument and presents no new evidence for the court to reconsider its decision on his travel expense claims." Def.'s Resp. at 8. Defendant argues that, to the extent plaintiff seeks review of prior GSBCA decisions, this court does not have jurisdiction to review decisions of GSBCA that are not currently before it. Id. at 7. Defendant argues that "[t]his [c]ourt is not bound by the GSBCA's decision in [Thurman] . . .." id., and that "Thurman is not even applicable to this case because none of Mr. Corrigan's travel expense claims seek reimbursement for driving his privately-owned vehicle in lieu of flying to his temporary duty stations," id. at 8, the claims at issue in Thurman. As for the travel expenses incurred during Mr. Corrigan's drive in his privately-owned vehicle to Seattle in March 2001, defendant argues that those expenses were "part of

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[29] The "constructive cost" to which plaintiff refers is "the constructive cost of the authorized method of transportation" where an "employee elects to use a [privately-owned vehicle] instead of an alterative form of transportation . . . authorize[d by the agency]." 41 C.F.R. § 301-70.105 (2005). The constructive cost is defined as "the sum of per diem and transportation expenses the employee would reasonably have incurred when traveling by the authorized method of transportation." 41 C.F.R. § 301-70.105(a).

his relocation expenses" and were "not covered by the agency."[30] Id.

Although opinions of the GSBCA are persuasive authority, they do not bind this court. See XTRA Lease, Inc. v. United States, 50 Fed. Cl. 612, 624 (2001) (using decisions of the Government Accountability Office (GAO) and the GSBCA as persuasive, but not binding, authority); Transam. Ins. Co. v. United States, 31 Fed. Cl. 602, 605 n.1 (1994) (recognizing decisions of Boards of Contract Appeals not to be binding on this court); Universal Restoration, Inc. v. United States, 16 Cl. Ct. 214, 218 (1989) ("[Armed Services Board of Contract Appeals] decisions, though persuasive, are not accorded stare decisis effect . . . ."). It is the duty of this court to apply the statutes and regulations to the facts of the case. This court is not bound by GSBCA's approach to the evaluation of personal convenience travel expense claims. Even if the GSBCA takes an inconsistent approach to personal convenience travel expense claims, that circumstance would have no bearing on the decisions of this court. In addition, because the facts of this case are not in dispute and the only dispute plaintiff raises is the application of the law, this court appropriately decided plaintiff's travel expense claims on summary judgment. See RCFC 56(c).

Even if this court were to apply the approach taken by the GSBCA in Thurman, plaintiff would still not be entitled to recover the travel expenses he claims. In Thurman, the GSBCA, quoting Yates, GSBCA 15109-TRAV, 00-1 BCA 30,785, 2000 WL 145477, articulated a three-step analysis for evaluating personal convenience travel expense claims applicable to situations

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[30] Plaintiff did not claim in his original briefing an entitlement to reimbursement for travel expenses for his drive to Seattle incurred at the time of his relocation; the court therefore did not address any such claim in its Opinion in Corrigan. The court declines to address such a potential potential claim here.

where "an employee chooses to travel in his or her own vehicle rather than by the means of transportation most advantageous to the government." Thurman, GSBCA No. 15562-TRAY, at 1-2. The GSBCA described the analysis as follows:

> First the agency should determine, through the standard application of statute and regulation, the allowability of the various components of an employee's travel claim. . .. The agency should then total the allowable costs.
>
> Second, the agency should determine the total constructive cost of the employee's travel had he or she traveled by the method of transportation deemed to be in the Government's best interest... .
>
> After computing the two totals, the agency should compare them. If the total of costs determined in standard fashion to be allowable is greater than the total of the constructive costs, the agency should limit reimbursement to the latter figure.

Id. at 2 (quoting Yates, GSBCA 15109-TRAY, 00-1 BCA 1130,785). Even assuming that this three-step approach were properly applicable to plaintiffs claims,[31] however, plaintiff would not be able to recover personal convenience travel expenses because plaintiff's claims are not "allowable" and therefore would not survive the first step of the analysis. Contrary to plaintiff's assertions, then, the court need not take a total cost approach by separately totaling the allowable and constructive costs and comparing them because the court would not reach step three in the evaluation of plaintiffs claims. Because this court effectively applied the first step in its opinion in Corrigan and

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[31] As correctly noted by defendant, plaintiff does not state a claim for the situation described in Thurman. Def's Resp. at 8.

appropriately dismissed plaintiffs claims at that stage. deciding that they were not "allowable" as a matter of law. see Corrigan, 68 Fed. Cl. at 601 ("As a matter of law, Mr. Corrigan is not entitled to reimbursement for any of his claimed travel expenses."). the court declines to reevaluate plaintiffs travel expense claims.

III. Conclusion

For the foregoing reasons, plaintiffs motion for reconsideration is DENIED. The Clerk of the Court is directed to ENTER JUDGMENT for defendant. No costs.

IT IS SO ORDERED.

Emily C. Hewitt

Emily c. Hewitt

Judge

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2006-5097

JOHN L. CORRIGAN,

Plaintiff-Appellant.

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: March 14, 2007

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and LINN, Circuit Judge. PER CURIAM.

On summary judgment, the Court of Federal Claims denied Mr. Corrigan's overtime and travel expense claims. Because the Court of Federal Claims committed no reversible error, this court affirms.

I

Mr. Corrigan presented overtime pay claims for the period beginning in December, 1999. Mr. Corrigan's claims include (1) "training travel on Sundays," (2) "training travel on both non-working days and working days during regularly scheduled and non-scheduled working hours," (3) "claimed 'commuting' time for overnight travel away from duty station," and (4) " claimed 'commuting' time for travel to and from work site within the official duty station." Corrigan v. United States, 68 Fed. Cl. 589, 591 (2005).

After both the Office of Personnel Management (OPM) and the General Services Board of Contract Appeals (GSBCA) denied Mr. Corrigan's claims in their entirety, he filed suit in the Court of Federal Claims seeking overtime pay under the Fair Labor Standards Act (FLSA), 5 U.S.C. §§ 201-206 (2000), and under the Federal Employee Pay Act (FEPA), 5 U.S.C. §§ 5542, 5544, 5546. Mr. Corrigan's suit also included claims for reimbursement of denied travel expenses under, inter alia, the Federal Travel Regulations (FTR), 41 C.F.R. §§

300-304 (2004). Corrigan v. United States., 68 Fed. Cl. 589, 591 (2005).

The Court of Federal Claims granted the Government's motion to dismiss Mr. Corrigan's FLSA overtime claims that accrued before October 20, 2001 as time-barred. Id. at 593. Next, the court granted the Government's motion for summary judgment for the remaining FLSA claims because Mr. Corrigan was exempt from FLSA coverage. Id. at 593-595. The court also noted, with regard to his FEPA claims, that Mr. Corrigan conceded that he had not received written authorization to work overtime. As such, the Court of Federal Claims determined that Mr. Corrigan was not eligible for overtime pay because he did not receive the required written approval. Id. at 596. Lastly, the court granted the Government's motion for summary judgment on Mr. Corrigan's travel expense claims. Id. at 601.

On reconsideration, Mr. Corrigan argued that his time-barred overtime claims deserve equitable tolling and treatment as continuing claims. Corrigan v. United States, 70 Fed. Cl. 665 (2006). The court dismissed these contentions because Mr. Corrigan

had not raised equitable tolling and the continuing claims doctrine during the original suit.' The trial court also declined to reconsider issues it had clearly decided on Mr. Corrigan's overtime pay claims. Id. at 669-672. Because GSBCA opinions do not bind the trial court, it properly refused to rely on Mr. Corrigan's reference to Peter C. Thurmon, GSBCA No. 15562-TRAY, 01-2 BCA 1131, 516 (June 27, 2001). Corrigan, 70 Fed. Cl. at 673. Mr. Corrigan then filed an appeal to this court.

BACKGROUND

On November 14, 1999, Mr. Corrigan began work for the National Credit Union Administration (NCUA) as a credit union examiner at the grade of CU-9. Credit union examiners generally work out of their homes and travel to the credit unions for examinations. Mr. Corrigan began work in the Los Angeles, California, workplace. His CU-9 examiner position

was classified as non-exempt from the provisions of the Fair Labor Standards Act (FLSA). On January 14, 2001, NCUA promoted Mr. Corrigan to a CU-11 examiner and assigned him a district of credit unions. Mr. Corrigan's CU-11 position was exempt from the FLSA. As voluntarily requested by Mr. Corrigan, he was reassigned to a new duty station in Seattle, Washington, effective April 8, 2001. Corrigan v. United States., 68 Fed. Cl. 589, 591 (2005).

As an examiner, Mr. Corrigan travels extensively on official business. For example, in March 2001, Mr. Corrigan drove his personal vehicle to Seattle, Washington during a work detail in advance of his voluntary reassignment. During his detail, he stayed with relatives. Mr. Corrigan submitted a travel voucher for the constructive cost[32] of staying with his relatives. The NCUA denied reimbursement for this expense. Id. at 597.

The agency also sent Mr. Corrigan to Montana from November 26-30, 2001, then to Anaheim, California from December 3-7, 2001, and on to Utah from December 10-14, 2001. Instead of traveling back to Seattle on the weekends, Mr. Corrigan decided to stay with his son in southern California between the November and December 2001 details. Mr. Corrigan rented a car during his weekends in southern California without his supervisor's authorization and sought reimbursement for the rental car. Id. at 598.

On another occasion, Mr. Corrigan traveled to Orlando, Florida for an August 1116, 2002 conference. Mr. Corrigan reserved a one-way airline ticket from Seattle to Orlando and a one-way airline ticket from Fort Lauderdale to Seattle. He traveled back to Seattle on August 24, 2002, eight days after the end of his official travel. On the last day of the conference in

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[32] The Court of Federal Claims also voluntarily lookedat the merits of Mr. Corrigan's equitable
tolling and continuing claims doctrine arguments; however, the court's ruling remained unchanged. Corrigan v. United States, 70 Fed. Cl. 665 (2006).

Orlando (August 16, 2002). Mr. Corrigan traveled to Fort Lauderdale and spent the night at a Holiday Inn Express. The NCUA denied Mr. Corrigan's request for reimbursement of his lodging expense at the Holiday Inn Express. Id. at 599.

On September 29, 2002, Mr. Corrigan traveled on official business from Seattle, Washington to Alexandria, Virginia to attend a training session. The training session ended at 12 noon on October 4, 2002. On October 2, 2002, Mr. Corrigan advised his supervisor via email that he would forego a non-stop flight from Dulles International Airport to Seattle on the afternoon of October 4, 2002, and would instead take an October 5, 2002 flight from Reagan National Airport. Mr. Corrigan's supervisor advised him that reimbursement of lodging expenses for the night of October 4, 2002 was not authorized because he could return to Seattle on the afternoon of October 4, 2002. Id. at 600.

This court reviews a grant of summary judgment by the Court of Federal Claims de novo, with justifiable factual inferences being drawn in favor of the party opposing summary judgment. Winstar Corp. v. United States, 64 F.3d 1531, 1539 (Fed. Cir. 1995) (en banc), aff'd, 518 U.S. 839 (1996).

The trial court properly dismissed Mr. Corrigan's claims accrued prior to October 20, 2001 because the claims were barred by the statute of limitations. While the statute of limitations is generally two years, the limitation can be three years for willful violations. 29 U.S.C. § 255(a) (2000). The court used three years for the statute of limitation. Corrigan, 68 Fed. Cl. at 593; Corrigan, 70 Fed. Cl. at 669. The court correctly noted that Mr. Corrigan's equitable tolling and continuing claims doctrine arguments present new legal theories, not properly brought for the first time on a motion for reconsideration. Corrigan, 70 Fed. Cl. at 668. Furthermore, the court voluntarily performed an extensive analysis on the merits and properly found that Mr. Corrigan,

in any event, would not prevail under these new legal theories. Id. at 669-671.

Mr. Corrigan contends that the Court of Federal Claims abused its discretion by dismissing his post October 20, 2001 FLSA overtime claims on summary judgment. However, in his motion for reconsideration and again in his brief to this court, Mr. Corrigan did not point to any facts in dispute to show summary judgment was not proper. As such, the Court of Federal Claims properly declined to reconsider summary judgment on these overtime claims.

The Court of Federal Claims properly found that Mr. Corrigan was not entitled to overtime pay under FEPA because he did not meet the written authorization requirement. 5 C.F.R. § 550.111(c). Mr. Corrigan presented no written authorization for any of his overtime. Corrigan, 68 Fed. Cl. at 596. Therefore, the court properly entered summary judgment.

The Court of Federal Claims also correctly found the claimed travel expenses were not allowable under the Federal Travel Regulations (FTR). 41 C.F.R. §§ 300-304 (2004). First, Mr. Corrigan's claim for lodging with relatives in Seattle was not allowable because he failed to offer any substantial additional costs incurred by his relatives due to his lodging with them as required in 41 C.F.R. § 301-11.12(c). Corrigan, 68 Fed. Cl. at 597. Second, Mr. Corrigan's rental car expense for two weekends in California was not allowable because his supervisor did not specifically authorize this expense as required by 41 C.F.R. § 10.450. Id. at 598. Third, Mr. Corrigan's lodging expense at the Holiday Inn Express in Fort Lauderdale, Florida was not allowable because the expense was not incurred for official business as required by 41 C.F.R. § 301-2.4. Id. at 599. Finally, Mr. Corrigan's lodging expense in Alexandria, Virginia when he could have returned to his home duty station was not allowable because the lodging expense was not authorized as required by 41 C F R 301-11.20. Id. at 600-601. The Court of Federal Claims properly analyzed the travel

expenses under 41 C.F.R. §§ 300-304. Corrigan, 68 Fed. Cl. 589.

Accordingly, this court finds no abuse of discretion or factual error. This court affirms the dismissal of Mr. Corrigan's time-barred overtime claims and the grant of summary judgment as to the other overtime claims and the travel expense claims.

AFFIRMED

United States Court of Appeals for the Federal Circuit

2006-5097

JOHN L. CORRIGAN,
Plaintiff-Appellant.

v.

UNITED STATES,
Defendant-Appellee.

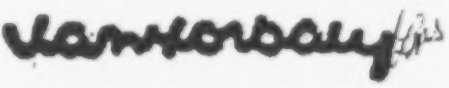
JUDGMENT ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO(S):
04-CV-1587.

This CAUSE having been heard and considered. It is

ORDERED and ADJUDGED:

AFFIRMED.
ENTERED BY ORDER OF THE COURT

MAR 14 2007
Date



Jan Horbaly, Clerk

ISSUED AS A MANDATE: May 29, 2007

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

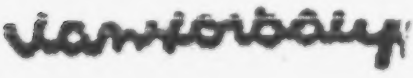
A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on May 29, 2007.

FOR THE COURT,



Jan Horbaly Clerk

Dated: 05/22/2007

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

November 30, 1999

GSBCA 15109-TRAV

In the Matter of RUSSELL E. YATES

Russell E. Yates, Houston, TX, Claimant.

Robert A. Tepfer, Lyndon B. Johnson Space Center, Houston, TX, appearing for National Aeronautics and Space Administration.

NEILL, Board Judge.

Russell E. Yates, a computer engineer employed by the National Aeronautics and Space Administration (NASA), asks that we review for correctness his agency's determination of the constructive cost of travel he was to undertake in conjunction with a temporary duty (TDY) assignment. Earlier this year, claimant was sent on official travel. Travel by air would have been in the Government's best interest. Mr. Yates, however, chose to make the trip in his personally owned motorhome rather than fly. The agency has properly determined that reimbursement to Mr. Yates for his transportation must be limited to the constructive cost of the travel (both transportation and per diem) had he gone by air. In constructing the amount of Mr. Yates' per diem, however, the agency has insisted on using the actual cost of his lodging at the mobile home campground rather than the estimated cost of a hotel room.

Mr. Yates contends that he is entitled to the latter. For the reasons set out below, we agree with the claimant.

Background

Mr. Yates received travel orders to perform software testing and to attend a critical design review for NASA in Tampa, Florida, from March 15 through March 19, 1999. Although the form of transportation most advantageous to the Government was for him to make the trip by air, Mr. Yates elected to make the trip to Tampa from his permanent duty station in Houston, Texas, in his personally owned motorhome. Mr. Yates left Houston on March 13 and arrived in Tampa on March 14. He performed his TDY assignment at Tampa from March 15 to March 19. On March 20, he left Tampa and arrived back in Houston on March 20.

In determining the limits of reimbursement for Mr. Yates, NASA computed a constructive cost based on his having traveled from Houston to Tampa by air. The computation is based upon a departure from Houston on March 14 and a return on March 19. The claimant has no objection to the timeframe used by the agency to figure the constructive cost of his trip. Rather, he challenges the manner in which NASA calculated the per diem to which he was entitled during this period. Specifically, he does not disagree with the agency's calculation of the meals and incidental expense (M&IE) portion of the per diem, but rather with the calculation of the lodging portion of this allowance.

NASA contends that, even in calculating a constructive per diem for Mr. Yates, it has no choice but to use his actual lodging expenses for the days in question when determining the lodging portion of that per diem.

Discussion

The agency's position in this matter is readily understandable. As we ourselves have previous noted, over the

years, the manner in which a Government employee's per diem allowance has been determined under applicable regulations has been the subject of considerable controversy. For obvious practical reasons, as the number of Government employees on travel has increased, there has been a gradual shift from the reimbursement of travelers for actual expenses to reimbursement on a fixed or flat-rate basis. This, however, has, at times, generated criticism on the ground that the Government, in providing a flat-rate per diem, often has reimbursed travelers more for their lodging than they actually paid. To rectify this problem, the "lodgings-plus" system of per diem was eventually introduced. Under this method, the traveler is given a flat rate for M&IE but is reimbursed for lodging strictly on an actual expense basis. See Dimitri & Eugenia Arensburger, GSBCA 14514-TRAV, 98-2 BCA ¶ 30,055. This method of per diem reimbursement is now firmly established in the Federal Travel Regulation (FTR). The FTR now only recognizes three methods for reimbursing per diem, namely: (1) lodgings-plus per diem; (2) reduced per diem; and (3) actual expense per diem. 41 CFR 301-11.5 (1998) (FTR 301-11.5).

NASA cogently argues that Mr. Yates was not authorized either a reduced per diem or an actual expense per diem. This, therefore, leaves only the lodgings-plus method for reimbursement of per diem. Under this method, an employee is to be paid only his or her actual lodging cost not to exceed the maximum lodging rate for the temporary duty location or stopover point. FTR 301-11.100. Hence the agency insists on using Mr. Yates' actual campground charges as the basis for the lodging component of his constructive per diem.

The FTR provides that an agency may not prohibit an employee from using a personally owned vehicle (POV) on official travel but, in the event the employee elects to use a POV, the agency must:

> Limit reimbursement to the constructive cost of the authorized method of transportation, which is the sum of per diem and transportation expenses the employee would reasonably have incurred when traveling by the authorized method of transportation . . . .

FTR 301-70.105.

As the claimant himself points out, key to this portion of the regulation is the verb "would reasonably have incurred." The mood of this verb is not indicative but rather conditional. Indeed, this is a classic "contrary to fact" condition. The constructive costs discussed in this provision of the regulation have not in actuality been incurred. Rather, if the employee had, in fact, gone by the authorized method of transportation, these costs would have been incurred. *In fact*, however, the employee went by POV and the costs were not incurred.

From a close reading of this provision in the FTR regarding constructive cost, we perceive a flaw in the methodology NASA has adopted to compute the constructive cost of Mr. Yates' trip to Tampa. The actual costs of Mr Yates' stay at the mobile home campground should not be used. Under this provision of the FTR, actual costs should not enter into the calculation of constructive costs. Given the wording of the provision, we find that the regulation does permit the agency, in cases such as this, to use an estimated lodging cost in computing the claimant's constructive per diem -- notwithstanding the unmistakably strong emphasis in the FTR on the use of actual lodging costs when normally reimbursing per diem.

It is, of course, important that the lodging estimate used by the agency be a realistic one. Fortunately for the claimant, one is readily available in this case. In a previous visit to the same site, Mr. Yates explains that he did stay at a local hotel.

He reports that the room rate at that hotel for March 1999 was $103 per night and that this is under the maximum allowable lodging rate of $104.

The agency should, therefore, recompute the constructive cost of Mr. Yates' trip to Tampa (i.e. the sum of per diem and transportation expenses) using this estimated hotel cost rather than Mr. Yates' actual cost of renting a location at the mobile home campground. The resulting figure should then serve as the limit on the claimant's reimbursable expenses for his TDY assignment to Tampa.

EDWIN B. NEILL
Board Judge

DECISIONS OF THE GSBCA

REFLECTING INCONSISTENCY

PC	GSBCA #	NAME	DATE
Judge Daniels			
BAD	13691	PHYLLIS G. THOMPSON	06/11/97
GOOD	13705	LORRIE L. WOOD	12/20/96
GOOD	15562	PETER C. THURMAN	06/27/01
GOOD	15872	BOBBY L. HUMPHRIES	09/04/02
Judge Williams			
GOOD	13993	SUSAN REED	10/16/97
BAD	15855	LEO BOSNER	03/28/03
Judge Neill			
GOOD	15109	RUSSELL E. YATES	11/30/99
GOOD	15366	PETER J. VAN DEUSEN	03/20/01
BAD	15937	CHARLES E. MALONE	11/14/02
Judge Hyatt			
GOOD	15523	BRIAN F. HAVITZ	08/15/01
BAD	15707	JOHN L. CORRIGAN	11/06/02
Judge DeGraff			
GOOD	15393	THOMAS L. LAUGHLIN	12/06/00
BAD	16096	JOHN L. CORRIGAN	05/22/03

GOOD means that the court respects personal convenience

BAD means that the court abhors personal convenience